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Fairness and Utility in Products Liability: Balancing Individual Rights and Social Welfare

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FAIRNESS AND UTILITY IN PRODUCTS LIABILITY: BALANCING INDIVIDUAL RIGHTS AND SOCIAL WELFARE

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FAIRNESS AND UTILITY IN PRODUCTS LIABILITY: BALANCING INDIVIDUAL RIGHTS AND SOCIAL WELFARE

JOHN L. WATTS*

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I. INTRODUCTION

The history of moral philosophy can be divided roughly into two distinct, warring camps: deontologists and consequentialists. Deontologists, or nonconsequentialists, judge the morality of an action by assessing its intrinsic worth instead of focusing on the consequences of the action.¹ Perhaps, deontological thought is epitomized at its most glorious extreme by this maxim: "Do what is right though it results in the demise of the world."²

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1. MANUEL VELASQUEZ & VINCENT BARRY, *PHILOSOPHY: A TEXT WITH READINGS* 316 (3d ed. 1988).

2. This famous proclamation paraphrases an even older Roman maxim, *fiat justitia ruat caelum*, let there be justice though the heavens fall. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998). Although it is often attributed to Immanuel Kant, its origin is unknown.

Consequentialists, on the other hand, judge the morality of action by evaluating results. Utilitarianism, the dominant consequentialist theory, views the morally just act as the one that creates the greatest good for the greatest number.³ These, of course, are oversimplified but useful generalizations.

In their purest form, these moral philosophies are like show dogs. In the theoretical arena, where their proponents run them through their carefully scripted hypotheticals, they seem majestic, confident, and perfect. However, removed from their controlled surroundings and placed into the world where so many factors collide or are unknown, their rigidity too often subjects them to crippling flaws. Deontology's demand to "do what is right" may resonate deeply, but there is seldom agreement on what is the right thing to do.⁴ Moreover, it is hard to ignore consequences when the heavens really might fall.⁵ Similarly, utilitarianism's focus on maximizing the collective welfare seems reasonable until one's personal welfare is sacrificed for the "greater good."⁶ Under the appropriate circumstances, each philosophy is a pleasure to behold, but day-to-day they demand too much to be ideal companions.

The law, on the other hand, is a mutt. While the supporters of these conflicting philosophies tend to adhere rigidly to the moral superiority of their ethic, the law has bred these philosophies together to derive the best qualities of each. The law must function in the all too uncertain world where the variables are innumerable, the facts often are incomplete or conflicting, and the events and parties are real. Individual rights are balanced against the demands of social welfare. This balancing can be seen in all fields of law.⁷ In constitutional law, the Bill of Rights protects certain fundamental rights against the demands of social utility.⁸ Yet even the First

3. VELASQUEZ & BARRY, *supra* note 1.

4. Leonard G. Ratner, *The Utilitarian Imperative: Autonomy, Reciprocity, and Evolution*, 12 HOFSTRA L. REV. 723, 778 (1984) (arguing that there is no nonutilitarian basis for choosing between the various a priori moral standards, the proponents of which claim each to be superior to the other).

5. This problem perhaps most clearly arises in the application of deontological ethics to the targeting of civilian populations as part of our nuclear deterrence policy. *See, e.g.*, Paul Ramsey, *A Political Ethics Context for Strategic Thinking*, in STRATEGIC THINKING AND ITS MORAL IMPLICATIONS 101, 134-35 (Morton A. Kaplan ed., 1973); MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 269-83 (1977).

6. *See, e.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 116-18 (1979) (discussing utilitarianism's propensity to sacrifice innocent persons for social welfare).

7. *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989) (providing a detailed discussion of the rise and dominance of consequentialist thought in legal jurisprudence and proposing a rights-based approach to choice of law analysis to constrain, rather than replace, utilitarian policy-based analysis).

8. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

Amendment's protection of the individual's right to free speech is subject to limitations where a "compelling interest" or "clear and present danger" threaten the collective good.⁹ Contract law protects the right to have private agreements enforced. This right, however, is typically limited to money damages rather than specific performance in order to encourage socially desirable contractual breaches that maximize economic efficiency.¹⁰ In property law, restrictive covenants, such as those that limit land use to single family dwellings, might be unenforceable when contrary to utilitarian demands of public policy.¹¹ This balancing is so fundamental to all fields that the law itself is appropriately symbolized by the scales of justice.

Tort law also has been shaped by the struggle to strike a proper balance between protecting individual rights and furthering social utility.¹² In his celebrated 1972 *Harvard Law Review* article, *Fairness*

(stating that substantive due process analysis involves balancing the liberty interest of the individual "and the demands of organized society"); *United States v. Ortiz*, 422 U.S. 891, 900 (1975) (Burger, C.J., concurring) (noting that the Fourth Amendment prohibition against "unreasonable searches and seizures" requires "balanc[ing] the rights of the individual with the needs of society"); JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 223 (1979); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (providing a detailed critical analysis of the prevalence of balancing rights with utility in constitutional law and a discussion of alternatives).

9. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (holding that content-based state restrictions on speech "must be narrowly tailored to promote a compelling Government interest"); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (finding that the First Amendment does not protect speech that creates "a clear and present danger [of bringing] about substantive evils that Congress has a right to prevent"); *see also* Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998) (arguing that actual constitutional practice reveals that constitutional rights do not typically trump social welfare concerns); Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 797 (1994).

10. *See generally* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §12.3 (Aspen 3d ed. 2004) (discussing the economic theory supporting efficient breach of contract where the party in breach gains more from breaching the contract than she would from full performance, even after compensating the nonbreaching party for the damages resulting from the breach); *see also* *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750-51 (7th Cir. 1988) (describing and applying efficient breach of contract theory).

11. *See, e.g.*, *Crane Neck Ass'n v. N.Y.C./Long Island Cnty. Servs. Grp.*, 460 N.E.2d 1336, 1339 (N.Y. 1984).

12. *See generally* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285 (2001) [hereinafter Keating, *Theory*] (describing the common law of torts as torn between fault, enterprise liability, and other norms like property rights); Edward C. Lyons, *Balancing Acts: Intending Good and Foreseeing Harm—The Principle of Double Effect in the Law of Negligence*, 3 GEO. J.L. & PUB. POL'Y 453 (2005) (discussing the task of balancing the often antithetical considerations of rights and utility in negligence law); M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017 (1998) (discussing the balancing of corrective justice and economic efficiency goals in proposed products liability reform legislation and the *Third Restatement's* treatment of warning defects); David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 434 (1993)

and *Utility in Tort Theory*, Professor George P. Fletcher describes this struggle as a “confrontation . . . between two radically different paradigms,” one that focuses solely on doing justice between the parties, and another that seeks to resolve private disputes in ways that best serve the collective good.¹³ Fletcher dubs the rights-based fairness model “the paradigm of reciprocity”¹⁴ and names the competing utilitarian model “the paradigm of reasonableness.”¹⁵ The paradigm of reciprocity emphasizes individual autonomy, and the paradigm of reasonableness emphasizes efficiency and community welfare.

Fletcher’s article is not simply a description of the clash between fairness and utility in tort theory; it is fueled by a deep opposition to utilitarianism’s propensity to demand individual sacrifice for the greater good.¹⁶ The unfairness of the reasonableness paradigm, according to Fletcher, is that it weighs the collective costs and benefits of an activity to society as a whole, without regard to the disproportionate distribution of the cost to the victim.¹⁷ The reasonableness paradigm allows individuals to be used as the means to achieving a socially beneficial end. Fletcher believes that the paradigm of reciprocity could serve as a descriptively and morally superior unifying theory of torts. While Fletcher’s article has grown in fame over the years and continues to be widely read and referenced,¹⁸ his paradigm of reciprocity has not been embraced as a unifying theory of tort law. Only rarely has it been applied by the

[hereinafter Owen, *Foundations*] (arguing that products liability law cannot, and should not, be reduced to a single unifying “metatheory” but instead requires a pluralist analysis from a variety of moral perspectives).

13. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539-40 (1972) [hereinafter Fletcher, *Fairness and Utility*].

14. *Id.* at 540; see also Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 KAN. L. REV. 59, 79 n.162 (1999) (citing Lawrence Vold et al., *Aircraft Operator’s Liability for Ground Damage and Passenger Injury*, 13 NEBR. L. BULL. 373, 380 (1935); Wex Malone, *The Formative Era of Contributory Negligence*, 41 U. ILL. L. REV. 151, 156-57 (1946) (discussing Lawrence Vold’s theory)) (noting that the concept of reciprocity of risk as a fundamental basis of tort theory did not originate with Fletcher’s work but was widely discussed in prior scholarship in the 1930s and 1940s).

15. Fletcher, *Fairness and Utility*, *supra* note 13, at 542.

16. See *id.* Fletcher’s application of deontological philosophy to the law is not limited to torts theory. In fact, Fletcher is more renowned for his influential and voluminous scholarship in the area of criminal law. Regardless of the field of law, a recurring theme in much of his work is the search for and commitment to values that are ends in themselves rather than seeking rules that will achieve some conception of social welfare. See generally George P. Fletcher, *In God’s Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608 (1999); George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275 (1998); George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985); George P. Fletcher, *Why Kant*, 87 COLUM. L. REV. 421 (1987) [hereinafter Fletcher, *Why Kant*].

17. Fletcher, *Fairness and Utility*, *supra* note 13, at 542-43.

18. See, e.g., Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 769 (1996) (ranking Fletcher’s *Fairness and Utility in Tort Theory* as the fifty-seventh most cited legal article of all time).

courts,¹⁹ and with a few notable exceptions, it is conspicuously absent from products liability scholarship.²⁰ Like Howard Hughes' Spruce Goose,²¹ it is admired for its imagination and scope, but no one seems confident it will actually fly.²²

As with torts generally, products liability has also struggled to balance individual fairness with social utility.²³ Since its approval in 1997, *Restatement (Third) of Torts: Products Liability (Third Restatement)* has been subject to criticism from both perspectives, but the loudest voices have been from those who view the *Third Restatement* as being too industry friendly at the cost of consumers.²⁴

This Article subjects the *Third Restatement* to the same contrasting analysis that Fletcher applied to torts generally in order to better understand its successes and failures in balancing the competing goals of fairness and utility. While Fletcher's article is used as a template, his paradigm of reciprocity proves to be unworkable when applied to bargained-for exchanges such as those

19. Of the fourteen published opinions that cite Fletcher's article, only one claims to apply notions of reciprocity to the case. See *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 662-63 (6th Cir. 1979). The court invoked principles of reciprocity as support for the proposition that business entities may take advantage of the benefits of dividing the business into parent and subsidiary corporate parts but must in fairness also be treated as distinct corporations for purposes of liability and benefits under the workmen's compensation statute. See *id.* While the court cited Fletcher's *Fairness and Utility in Tort Theory*, the argument is more akin to estoppel than Fletcher's paradigm of reciprocity.

20. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 606 (1985) (criticizing Fletcher's theory for being normatively unattractive and for failing to explain tort "[c]ases involving preexisting relationships, such as nonnegligent auto/passenger and doctor/patient injuries").

21. The "Spruce Goose" is the nickname for the massive, 218 foot-long, plywood sea plane built by Hughes Aircraft as a prototype transport designed to carry troops and supplies across the Atlantic Ocean during WWII. Unfortunately, engineering obstacles and budget overruns prevented its completion until 1947. It flew only once, for about one mile with Howard Hughes at the controls. Nevertheless, it remains an object of study and wonderment and can be viewed at the Evergreen Aviation and Space Museum in McMinnville, Oregon.

22. See Heidi M. Hurd, *Nonreciprocal Risk Imposition, Unjust Enrichment, and the Foundations of Tort Law: A Critical Celebration of George Fletcher's Theory of Tort Law*, 78 NOTRE DAME L. REV. 711, 712 (2003) (criticizing Fletcher's article as "descriptively implausible, normatively unattractive, and ultimately conceptually incoherent"). While much of her criticism has merit, her basic argument depends upon a more dogmatic interpretation of Fletcher's paradigm of reciprocity than he was suggesting. See also Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 314-16 (1996) [hereinafter Keating, *Reasonableness*] (criticizing reciprocity theory for its failure to explain the law of due care).

23. See Owen, *Foundations*, *supra* note 12 (approaching the issues from a variety of moral perspectives rather than adopting a single metatheory).

24. See generally Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. INT'L & COMP. L. REV. 227 (1997); Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700 (2003); Note, *Just What You'd Expect: Professor Henderson's Redesign of Products Liability*, 111 HARV. L. REV. 2366, 2381 (1998); Jerry J. Phillips, *Consumer Expectations*, 53 S.C. L. REV. 1047 (2002); Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 889 (2005).

that occur between manufacturers and consumers in products liability. A modification to that model, herein dubbed the “autonomy paradigm,” provides a clearer lens through which to view the *Third Restatement*.

Part II explains Fletcher’s paradigms of reciprocity and reasonableness in detail and highlights the ability of each to provide useful but contrasting views of tort law. Part III discusses the problems and limitations inherent in the paradigm of reciprocity, including its inability to account for bargained-for relationships. Its failure to achieve broader application is attributed to its unnecessarily narrow conception of liberty and dogmatic disregard for the demands of utility. The “autonomy paradigm” is proposed as a modification that retains reciprocity’s goal of protecting equal liberty but broadens the test of equal freedom to include the *express and implied* consent to risks in exchange for *express and implied* benefits. The autonomy paradigm also makes modest utilitarian concessions in order to create a balanced and practical conceptual model that can be applied to the full range of tort law.

Part IV discusses the evolution of products liability law leading to the drafting of the *Third Restatement*. This discussion forms the basis for the ensuing analysis in Part V, which applies the contrasting autonomy paradigm and reasonableness paradigm to the three primary categories of product defects as described in the *Third Restatement*: manufacturing, warning, and design defects. The analysis provides the reader with markedly differing views of the same legal landscape. In doing so it reveals that in most respects individual fairness and social utility are balanced by and embodied in the *Third Restatement*. This balancing, as in torts generally, is achieved through the use of several tests based upon distinct concerns rather than the application of a single mega theory of liability applied to all cases and claims.

Part VI discusses the one area where fairness is unnecessarily sacrificed for utility: claims brought by bystanders (strangers to the product rather than consumers) injured by dangers inherent in useful product design. Finally, it advances several strict liability proposals to restore the balance between fairness and utility with regard to bystanders injured by dangerous but socially useful product designs.

II. FLETCHER'S PARADIGMS OF RECIPROCITY AND REASONABLENESS

Fletcher's article mirrors the conflict between rights-based scholarship²⁵ and economic scholarship that was raging in torts theory at that time.²⁶ The two paradigms he describes serve as useful contrasting lenses for viewing the body of tort law from distinct perspectives. The contrasting view highlights the conflict in tort law between fairly treating the parties before the court and furthering collective welfare. His analysis enhances our understanding of the nature of strict liability and makes us question our fundamental assumption regarding the requirement of fault for compensation. But Fletcher does not seek to combine or balance the competing demands of social utility and individual rights.²⁷ He regards the paradigm of reciprocity as both normatively and descriptively superior to the paradigm of reasonableness.²⁸ In the end, however, reciprocity of risks proves too slender a reed upon which to support tort law as a whole.

A. *The Paradigm of Reciprocity*

As a deontological model, the paradigm of reciprocity must adhere to a nonconsequential value that serves as its foundation.²⁹ One of the historical criticisms of all deontological thought is the subjective nature of the fundamental values upon which it is based. Whether the source is religion, natural law, or reason, there is no agreement on the fundamental values or their origins. To resolve this problem, Fletcher, like Immanuel Kant,³⁰ John Rawls,³¹ and many others before him, identifies individual autonomy—freedom—as the most fundamental right of all persons.³² Individual liberty allows each

25. Fletcher, *Fairness and Utility*, *supra* note 13, at 540.

26. See generally George P. Fletcher, *Remembering Gary—and Tort Theory*, 50 UCLA L. REV. 279 (2003). In 1972, Professor George P. Fletcher was at the University of California School of Law immersed in what he has described as the “headiest hothouse of ideas” that he has ever known. *Id.* at 279. In addition to Fletcher, UCLA School of Law was at that time the home of such tort giants as Gary Schwartz, Richard Epstein, and philosophers Herbert Morris and Dick Wasserstrom.

27. *Id.* at 285 (“I implicitly favored the paradigm of reciprocity, but I did not then and I do not now believe in a synthesis that could resolve the conflict between the thesis of reciprocity and the antithesis of reasonableness.”).

28. *Id.*

29. Fletcher, *Fairness and Utility*, *supra* note 13, at 550.

30. E.g., IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (Harper & Row 1964) (1785). At the risk of oversimplifying Kant's writings, one clear tenet of his work is that people should always be treated with respect to their dignity as autonomous beings and always as ends in themselves. This principle is central to Fletcher's paradigm of reciprocity. See also Fletcher, *Why Kant*, *supra* note 16, at 428 (discussing Kant's influence upon legal thought, in particular, the premise that individual rights “trump” the demands of utility and efficiency).

31. See e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

32. See Fletcher, *Fairness and Utility*, *supra* note 13, at 550.

person to decide what constitutes a good life and what ends, if any, are worth pursuing.³³

The paradigm of reciprocity was heavily influenced by Rawls' *A Theory of Justice*, which was published the previous year.³⁴ By analogy to Rawls' first principle of justice, Fletcher's paradigm of reciprocity is premised upon the belief that "all individuals in society have the right to roughly the same degree of security from risk."³⁵ Under this model, the collective utility of the activities and the impact of tort judgments on society are irrelevant.³⁶ A defendant is liable only for injuries caused by activities that create "risk[s] greater in degree and different in order" from the risk created by the plaintiff.³⁷

Like Rawls, Fletcher believes that all members of society have the right to enjoy the maximum liberty compatible with equal liberty for all.³⁸ The problem is that all freedom of action creates some risks of harm to others. Harm, particularly physical harm, greatly impairs one's freedom. Individual freedom of action is also circumscribed if one is prevented from acting whenever the action reduces the security of others. Freedom of action must be balanced against the right to security from harm. There is no reason, however, to circumscribe liberty unless it is incompatible with the equal freedom of others. The dilemma is how to balance liberty with security.

To balance the conflicting demands of freedom and security, Fletcher insists that one needs to focus only on the conduct of the parties.³⁹ The paradigm of reciprocity is based upon a model of waiver or consent.⁴⁰ Fletcher looks at individual conduct to determine the level of risk to which that individual has consented.⁴¹ Fairness requires that one waive the right to be secure from risks in equal measure to the level of risk one's own conduct imposes on others.⁴² When, however, the plaintiff is injured by a risk greater in degree than the risk the plaintiff imposed on the defendant, the plaintiff is

33. See John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677, 684 (1988) (proposing that autonomy in the context of tort law has "an intrinsically valuable condition that involves the right to fashion one's own life plan").

34. See Fletcher, *Fairness and Utility*, *supra* note 13, at 550 n.50 (citing John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 165 (1958) and RAWLS, *supra* note 31). Rawls' first principle of justice is that "each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all." *Id.* (quoting RAWLS, *supra* note 31, at 165).

35. *Id.* at 550.

36. *Id.* at 540-41.

37. *Id.* at 542.

38. See *id.* at 550.

39. *Id.* at 540-41.

40. *Id.* at 569. Fletcher does not refer to consent but rather the "strategy of waiver." *Id.*

41. See *id.* at 540.

42. *Id.* at 569.

entitled to compensation.⁴³ One also consents implicitly to the “background” level of risk created by common activities, like normal motor vehicle driving, in which everyone necessarily partakes.⁴⁴ These risks are, as a class, offsetting reciprocal risks.⁴⁵ Harms that result from these reciprocal risks are not compensated because the right to be free from these risks is waived by participation in the risk-creating activity.⁴⁶

Fletcher recognized that “[t]he interests of society may often require a disproportionate distribution of risk.”⁴⁷ Yet he believes the tort system’s general limitation of remedies to money damages sufficiently balances the needs of society with the rights of the individual without the need for further protection in the test for liability. The paradigm of reciprocity does not criminalize or enjoin the socially useful activity but makes the actor pay for injuries that result from the unbalanced distribution of risks.⁴⁸

B. *The Paradigm of Reasonableness*

The paradigm of reasonableness emphasizes efficiency and community welfare.⁴⁹ In many respects, it resembles the ordinary negligence cost-benefit formula⁵⁰ infused with the law and the economic principles typified by the scholarship of Richard Posner, Guido Calabresi, and Ronald Coase.⁵¹ Its fundamental premise is that tort law should encourage activities that maximize benefits to society as a whole.⁵² Reasonableness is determined by comparing the costs and benefits of the injury-causing activity to determine if it yields a net gain in social utility.⁵³ If the activity’s benefits to society as a whole outweigh its costs, including any resulting injuries, then the plaintiff is not entitled to recover.⁵⁴ Therefore, a defendant is

43. *Id.* at 542.

44. *Id.* at 548.

45. *Id.* at 548.

46. *Id.* at 569 (“The paradigm of reciprocity, on the other hand, is based on a strategy of waiver. It takes as its starting point the personal rights of individuals in society to enjoy roughly the same degree of security, and appeals to the conduct of the victims themselves to determine the scope of the right to equal security.”).

47. *Id.* at 550.

48. *Id.* at 569 (Reciprocity “protect[s] individual autonomy by taxing [in the form of tort damages], but not prohibiting, socially useful activities.”).

49. *Id.* at 542.

50. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P . . .”).

51. *See generally* GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

52. Fletcher, *Fairness and Utility*, *supra* note 13, at 543.

53. *Id.* at 542.

54. *Id.*

liable only for injuries caused by activities that, on balance, create more harm than benefits.⁵⁵

The paradigm of reasonableness is perhaps most closely associated with the risk-utility formula articulated by Learned Hand in *United States v. Carroll Towing Co.* In *Carroll Towing*, a negligently operated tugboat caused a barge loaded with government flour to break free of its pier and drift into a tanker, whose propeller ruptured a hole in the barge bottom, causing the barge to sink.⁵⁶ In considering the comparative negligence of the barge owner for failing to have a bargee on board who could have utilized pumps to save the vessel, Learned Hand articulated his famous formula.⁵⁷ Liability is imposed if the burden of adequate precautions (*B*) is less than the gravity of harm (*L*) multiplied by the probability of harm (*P*).⁵⁸ So, for example, assume that we determine that the precaution of having a bargee on board would cost \$30,000 a year, while a barge breaks free an average of once a year and causes an average of \$20,000 in damages. In such a case, the defendant would not be liable for failing to pay more for a precaution than the cost of the foreseeable harm. Although such precise calculations were not possible,⁵⁹ the court concluded that the cost of keeping a bargee on board the barge during the "haste and bustle" of daylight activity on New York Harbor during the full tide of war was less than the foreseeable harm likely to result absent this precaution.⁶⁰ Accordingly, as a matter of efficiency, the court concluded that the barge operator was contributorily negligent for not keeping a bargee on board during daylight hours.⁶¹

55. *See id.* at 542-43.

56. *United States v. Carroll Towing Co.*, 159 F.2d 169, 171 (1947).

57. *Id.* at 173.

58. *Id.* (expressing the formula mathematically as $B < PL$); *see also* Posner, *supra* note 51, at 32-33. Judge Posner's explanation of Hand's formula is now notorious.

59. As Judge Learned Hand noted in his opinion subsequent to his famous formula from *Carroll Towing*:

[O]f these factors care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries. It follows that all such attempts are illusory, and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation.

Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949).

60. *Carroll Towing*, 159 F.2d at 174.

61. *See id.*

*C. The Paradigms Applied to Strict Liability, Negligence, and
Intentional Torts*

Fletcher maintains that the contracting paradigm of reciprocity is a descriptively superior model capable of unifying the seemingly diverse categories of strict liability, intentional torts, and negligence, while the paradigm of reasonableness can account only for some negligence claims.⁶² For example, the paradigm of reciprocity accounts for the imposition of strict liability for ultrahazardous activities like blasting, fumigating, and crop dusting because these activities create risks greater in degree and different in order (nonreciprocal) compared to the risks of ordinary activities.⁶³ Under this model it is irrelevant that these ultrahazardous activities are socially beneficial or that the risks are justifiable from a utility-maximizing perspective.⁶⁴ The sole focus is on the level of risk created by the defendant and the plaintiff. Thus, when a construction company's stock of explosives accidentally detonates and the concussion injures an adjacent homeowner, liability is imposed despite the social utility and the exercise of reasonable care.⁶⁵ The risk to the adjacent homeowner created by the use and storage of explosives, while justifiable, is greater than the risks the homeowner imposes on the construction company. The socially beneficial activity is not criminalized or enjoined, but the individual's loss is compensated.⁶⁶ On the other hand, the paradigm of reasonableness cannot account for the imposition of strict liability because even the high degree of risk associated with these activities can be justified by the tremendous collective benefits they provide.

When applied to negligence claims, Fletcher's two paradigms often result in similar outcomes, but the tests employed and the factors considered are philosophically distinct. For example, an automobile accident between two drivers, each following the rules of the road, would result in no liability under either paradigm.⁶⁷ Both drivers impose similar reciprocal risks to the other, and normal driving is socially beneficial, reasonable, and efficient despite the harms that result.⁶⁸ In contrast, when one driver weaves in and out of traffic at seventy miles per hour, while the other remains in her lane, traveling

62. See Fletcher, *Fairness and Utility*, *supra* note 13, at 540-50.

63. *Id.* at 547.

64. *Id.* at 540-41.

65. See generally *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 511 (1931) (Plaintiff's home and business were damaged, and she was thrown from her bed and injured when defendant's store of dynamite used in connection with a hydroelectric development suddenly exploded).

66. Fletcher, *Fairness and Utility*, *supra* note 13, at 550-51.

67. *Id.* at 543.

68. *Id.*

at the posted speed limit of forty miles per hour, the speeding driver creates a nonreciprocal risk compared to the other. If their collision results in an injury proximately caused by the speeding driver, she will be held liable. The reasonableness paradigm also imposes liability, but the rationale is that the modest increase in utility that results from speeding is significantly outweighed by the increased risk of harm.

Similarly, Fletcher maintains that intentional torts like assault and battery are aptly explained by the paradigm of reciprocity.⁶⁹ If a defendant acts with intent to cause a harmful or offensive contact, or knows such a contact is substantially certain to result, the ensuing risk is of a degree and kind entirely distinct from the background of risks one normally accepts as part of one's participation in society.⁷⁰ The reasonableness paradigm also imposes liability for many intentional torts as long as they do not result in greater social utility.

D. The Unfairness of the Paradigm of Reasonableness

Although Fletcher believes the paradigm of reciprocity is descriptively superior to the reasonableness paradigm, it is his moral aversion to the paradigm of reasonableness's propensity to sacrifice the "individual to the demands of maximizing utility" that drives him to embrace the alternative paradigm of reciprocity.⁷¹ Under the reasonableness paradigm, where the injury-causing activity has sufficient social utility, compensation is denied regardless of the nonreciprocal nature of the risks imposed. Fletcher cites several examples illustrating this problem: the streetcar company that knows its trains will occasionally jump the track; the police officer who injures a bystander while shooting at a fleeing felon; and the logger who floats logs downriver despite his knowledge that the activity might cause flood damage to downstream crops.⁷² In each instance, the utility of the injury-causing activity might result in the plaintiff receiving no compensation for his injury under the paradigm of reasonableness. Under the paradigm of reciprocity, instead of being sacrificed, persons injured by these activities would be compensated because of the nonreciprocal nature of the risk imposed.⁷³

A hypothetical variation of the facts in *United States v. Carroll Towing Co.* highlights the normative objection to the paradigm of reasonableness. Imagine that the plaintiff saves a little each week in order to purchase a \$20,000 powerboat that he keeps tied to a marina

69. *Id.* at 550.

70. *Id.* Curiously, Fletcher describes battery as "a rapid acceleration of risk, directed at a specific victim." *Id.*

71. *Id.* at 573.

72. *Id.* at 563.

73. *Id.* at 550-51.

pier when not in use. The defendant's barge becomes unmoored and drifts into the plaintiff's boat, sending it to the bottom of New York Harbor. Assume that the court is able to determine with perfect prescience that the cost of employing sufficient barges would be \$30,000 annually and that a barge will break free of its mooring once a year and cause an average of \$20,000 in damages to other vessels or structures. Under the reasonableness paradigm, the burden of taking adequate precautions would be greater than the probability of harm multiplied by the gravity of the injury, resulting in no negligence and no liability. From a utilitarian and efficiency perspective, it is not reasonable to spend \$30,000 in order to prevent \$20,000 in losses.

Conversely, from a fairness perspective, the imposition of liability under the same facts is required. Utilitarian concerns might well dictate that the defendant not be criminally sanctioned, enjoined, or compelled to spend \$30,000 to prevent the \$20,000 loss. Nevertheless, it seems unfair that the plaintiff should suffer a loss of \$20,000 in order to save the defendant \$30,000. The reciprocity paradigm leaves the defendant free to choose the more efficient method of conducting his business but requires that he pay the less expensive damages caused by the nonreciprocal risks created by his choice. Hence, the defendant's choice would be between \$30,000 for prevention or \$20,000 in damages, not \$30,000 in prevention or nothing.

It is strange that tort law regards it as reasonable to leave the innocent victims of welfare-maximizing activities uncompensated,⁷⁴ while criminal law regards the sacrifice of morally innocent individuals for the good of society as unjust.⁷⁵ In criminal law, innocent persons are not to be punished for crimes they did not commit—even if it can be justified by application of utilitarian calculations—because innocent persons have a moral right to have their autonomy respected and not be treated as a means to an end.⁷⁶

74. See *id.* at 567.

75. See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."); see also 4 WILLIAM BLACKSTONE, COMMENTARIES *352 ("[B]etter that ten guilty persons escape, than that one innocent suffer."); Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997) (discussing the historical foundations and rationale for Blackstone's famous ten-to-one ratio).

76. See E.F. CARRITT, ETHICAL AND POLITICAL THINKING 65 (Greenwood Press 1973) (1947) (Illustrating the potential for utilitarian principles to justify punishment of the innocent: "[I]f some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty; indeed this would only fail to be an ideal instance of utilitarian 'punishment' because the victim himself would not have been so likely as a real felon to commit such a crime in the future; in all other respects it would be perfectly deterrent and therefore felicitous."); see also Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation*

Yet if the imposition of criminal sanctions on morally innocent defendants is deemed an unfair imposition on individual rights, then the uncompensated imposition of harm on innocent victims of socially useful activities also must be judged as an unfair, though perhaps less severe, imposition on individual rights.⁷⁷

Indeed, in some circumstances, the paradigm of reasonableness would not compensate victims of even intentional harms as long as the act results in a net social utility. While Fletcher never discusses this aspect of the paradigm of reasonableness, the theoretical potential is illustrated by a variation of the classic trolley dilemma articulated by philosopher Judith Jarvis Thompson.⁷⁸ A trolley is moving down the track towards five people who, for purposes of the hypothetical, are unaware of its approach and cannot be warned of the danger. However, one can save these five people by pushing a large man in front of the trolley, thereby stopping it before it reaches the other five persons on the track.⁷⁹ The reasonableness paradigm would not impose liability because the cost of one life is justified in order to prevent the loss of five lives. If the unrealities of the problem are set aside, the dilemma highlights the potential of utilitarian thought to sacrifice individuals for the collective good.⁸⁰ The paradigm of reciprocity, on the other hand, would compel liability for

Theory of Punishment, 65 TUL. L. REV. 299, 324 n.93 (1990) ("If a judge were actually to follow a utilitarian theory of punishment, the judge might be required to punish a defendant who was widely believed to be guilty, even if the judge knew the defendant to be innocent."); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 320 n.11 (1984). *But see* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 118-19 (2000) (insisting that claims that utilitarianism could support the framing of the innocent are based upon a misapplication of an act-utilitarian ethic of individual behavior to the institutions and process necessarily central to utilitarian penology). Binder and Smith, however, do not appear to directly refute Carritt's hypothetical, but rather dispute the conclusions of the hypothetical when applied to institutions with a uniform, utility-maximizing process. *Id.* at 133-35.

77. To highlight the injustice that can result from an exclusive focus on collective welfare, Fletcher draws an analogy between the paradigm of reasonableness in tort cases and strict liability in criminal cases. In *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472 (1844), the court upheld a bigamy conviction against a woman who sincerely, but incorrectly, believed her first husband was dead. *Id.* at 473. While the court acknowledged that Mrs. Mash was not blameworthy for her mistake, the conviction was justified by the need to deter bigamy for the sake of social order. *Id.* The morally innocent suffers for the collective good. The reader will be relieved to learn that Mrs. Mash was pardoned by the Governor before she was sentenced. *Id.* at 475.

78. *See* Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 MONIST 204 (1976).

79. *Id.* at 206.

80. *But see* Ratner, *supra* note 4, at 752 (suggesting that the "monstrous" potential of utilitarian theory is eliminated by the incorporation of sociobiological evolution principles because monstrous conduct is inconsistent with "long-run human survival").

imposing this nonreciprocal risk on the unfortunately placed large man despite the utility of sacrificing him.⁸¹

Fletcher recognizes that utilitarian concerns demand that certain socially beneficial activities be permitted despite the resulting nonreciprocal risks.⁸² The problem with the paradigm of reasonableness is that it seeks to determine whether the defendant should have engaged in the harm-causing activity instead of another course of conduct, rather than determining if, in fairness, the plaintiff should be compensated for his loss.⁸³ An exclusive focus on the utilitarian calculus might be appropriate if a finding of liability in ordinary tort claims resulted in the prohibition or criminalization of conduct that maximizes the collective welfare of society.⁸⁴ Of course, tort liability does not result in criminal sanctions, and injunctive relief is not available except under a few unique circumstances.⁸⁵ Rather, a finding of liability results in the defendant compensating the plaintiff for the harm caused by the defendant's conduct. Enterprise liability theory dispels concerns that imposing compensatory damages will have dire consequences on utility.⁸⁶ If the defendant's conduct is efficient, it still costs less to compensate the plaintiff than it would cost to implement safer practices.⁸⁷ Moreover, if no harm results from the defendant's nonreciprocal risk-creating activity, tort law is not implicated.⁸⁸

The paradigm of reciprocity's requirement that those engaged in socially useful activities should nonetheless pay for the harms they

81. I suspect Fletcher would insist that the large man cannot be sacrificed to save the others.

82. See Fletcher, *Fairness and Utility*, *supra* note 13, at 550.

83. See *id.* at 556-57.

84. See *id.* at 568.

85. Injunctive relief is generally available only in instances of ongoing intentional torts and nuisance claims. See *Walsh v. Johnston*, 608 A.2d 776 (Me. 1992) (describing an injunction requiring removal of a portion of cottage encroaching on the owner's land). Even when a nuisance is established, injunctive relief may be denied if the activity is socially useful and the nuisance cannot be abated without effectively closing the defendant's business or rendering it economically unfeasible. See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (ordering damages rather than injunctive relief where the defendant's cement plant produced dust that interfered with the use and enjoyment of nearby homes where the loss recoverable was small in comparison with the cost of removal of the nuisance).

86. See, e.g., Keating, *Theory*, *supra* note 12 (explaining the rationales for enterprise liability and criticizing the *Restatement (Third) of Torts'* implicit claim that strict liability is not a general theory of responsibility for accidental physical injury).

87. *Id.*

88. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986) (awarding nominal damages for denial of speech rights); *Halperin v. Kissinger*, 606 F.2d 1192, 1207-08 & n.100 (D.C. Cir. 1979) (stating that damages could be "inferred" from violation of substantive right to be free from unlawful search), *aff'd in part*, 452 U.S. 713 (1981). At least with regard to negligence claims, harm is an essential element of the claim. General harm is required in other tort actions although it is sometimes presumed with regard to dignitary torts or is not subject to quantification.

cause is instantly recognizable to those familiar with products liability theory. Strict products liability is justified, at least in part, by the notion that product manufacturers should spread the costs of the harms their products cause among those who benefit from the use of their products.⁸⁹ Yet Fletcher's reciprocity theory is conspicuously absent from the bulk of products liability theory.⁹⁰ In order to understand why the paradigm of reciprocity has not had a wider practical impact on tort law and on products liability in particular, it is necessary to expose its limitations and revise the model to make it applicable to products liability. The goal is to retain reciprocity's focus on individual fairness while creating a more comprehensive and balanced model that can be effectively applied by the courts.

III. PROBLEMS WITH AND ALTERNATIVES TO THE PARADIGM OF RECIPROCITY TEST

Two problems with the paradigm of reciprocity have hampered its real world applications. First, Fletcher's paradigm of reciprocity fails to serve as a comprehensive theory of tort law because it focuses exclusively on individual autonomy and fails to sufficiently balance the needs of society. Second, while purporting to be based upon a waiver of security or consent to risk, the test measures consent only by risk creation. This test ignores all other express and implicit exchanges of security for freedom. As a result, the reciprocity paradigm proves unworkable, unfair, and overly simplistic when applied to the innumerable real world interactions in which members of a complex society expressly or impliedly consent to nonreciprocal risks in exchange for some other perceived benefit.

A. *The Utility of Background Risks*

Fletcher acknowledges that the paradigm of reciprocity leaves unresolved certain problems he considers to be at the "fringes" of tort law.⁹¹ But these problems arise at the heart of many tort disputes,

89. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) ("Finally, many believe that consumers who benefit from products without suffering harm should share, through increases in the prices charged for those products, the burden of unavoidable injury costs that result from manufacturing defects."); RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) ("On whatever theory . . . public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production . . ."); see also Keating, *Theory*, *supra* note 12, at 1295 (discussing the rationales for enterprise liability); John E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 809-10 (1976).

90. Keating, *Reasonableness*, *supra* note 22, at 314 (noting that reciprocity theory has not been applied to products liability).

91. Fletcher, *Fairness and Utility*, *supra* note 13, at 549 n.46.

rather than at the periphery. Suppose, for example, a motorist injures a pedestrian. Assuming the pedestrian is also a motorist some of the time, even if not at the time of injury, how does the paradigm of reciprocity resolve the pedestrian's claim? In other words, must the risks be simultaneous, or can reciprocal risks offset each other as long as both parties participate in the activity, albeit at different times? The problems become more complex where the injured party never participates in the activity that caused his injury. What if a pedestrian who never drives or rides in motor vehicles is injured by the driver of a motor vehicle? Does everyone have to engage in the activity for the risks to be deemed reciprocal or just most of society?⁹² Fletcher calls this the problem of "protecting minorities."⁹³

In order to resolve these problem cases, individual freedom must be balanced with social utility. A solution is suggested by Fletcher's discussion of the "background risks" of common activities that generally impose reciprocal risks on all as a cost of community living.⁹⁴ These background risks of community living are, of course, a reflection of the utilitarian decisions that are made either through custom or positive law.⁹⁵ Normal driving includes calculations about what speeds are reasonable, despite the risks, because of the utility. There certainly would be more security if everyone drove at slower speeds, but there would be a concomitant loss of utility and liberty.⁹⁶ Rather than honor the wishes of those who choose not to participate or who may have opted for safer but less efficient rules of the road, the background risks of common activities, like the risk associated with what might be described as reasonable driving, must be imposed on all persons. The fairness of exposing others to background risks seems justified by the direct benefits the nonparticipants receive from these background risks.⁹⁷ Indeed, a common understanding of fair and just interactions with others is largely based upon an innate

92. *See id.* at 572.

93. *Id.*

94. *Id.* at 543. Fletcher does not resolve these problems but does describe certain common activities, such as ordinary driving, as background risks that we may be expected to bear without compensation. *Id.*

95. *See id.* Fletcher never acknowledges the utilitarian calculus that has led to common activities or the customs and rules we regard as ordinary driving.

96. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) ("Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky.").

97. Of course, after a risk results in harm to the plaintiff, it might seem that the harm outweighs the benefits the plaintiff received from the background activity that harmed the plaintiff. However, it is equally true with regard to harms resulting from reciprocal risks. To continue the analogy to John Rawls' theory of justice, we must view the exchange from behind a "veil of ignorance." RAWLS, *supra* note 31, at 136-42. From this original position behind a veil of ignorance, it seems fair to let the harm stay where it fell as long as there was a fair exchange of risks and benefits.

understanding of a balanced, reciprocal exchange. Imposing background risks of common activities on all members of society as a concession to the reality of community living and utility is necessary to make a workable system.⁹⁸ Without this balance of fairness and utility, no model is practical.

B. Bargained-for Relationships

Fletcher also conceded that the paradigm of reciprocity could not account for several categories of torts, including medical malpractice,⁹⁹ premises liability,¹⁰⁰ and most significant for our purposes, products liability.¹⁰¹ Fletcher believed these claims raised special problems because of the consensual, bargained-for nature of the relationships.¹⁰² The problem of applying Fletcher's nonreciprocal risk test directly to products liability is readily apparent. All products create some risks for the consumer while the consumer typically imposes no reciprocal risks upon the product manufacturer.¹⁰³ Direct application would result in the imposition of liability whenever the user was injured by a product risk. Yet, at its philosophical epicenter, the paradigm of reciprocity's basic notions of freedom and autonomy are also found at the heart of contract law generally.¹⁰⁴ Therefore, it is odd that Fletcher adopted a test that failed to account for bargained-for exchanges.

The brilliance of the paradigm of reciprocity is its ability to apply notions of consent and autonomy to wide-ranging activities, often involving complete strangers. Reciprocity of risk supplies the means to measure the default degree of security to which one is entitled in the absence of expressed waiver or consent. Reciprocal risks are implicitly accepted as a proxy for actual consent. But the test fails to account for express or implied consent to risk in exchange for benefits, other than the freedom to impose similar risks on others. The paradigm of reciprocity must be modified to rectify this inherent weakness.

98. Fletcher, *Fairness and Utility*, *supra* note 13, at 543.

99. *See id.* at 548 n.43.

100. *Id.*

101. *Id.* at 544 n.24.

102. *Id.* (discussing the market relationship between the manufacturer and consumer); *Id.* at 548 n.43 (discussing negligence and the "liability of physicians to patients and occupiers of land to persons injured on the premises").

103. At least no risk distinct from those that users impose upon others generally.

104. *See, e.g.*, FARNSWORTH, *supra* note 10, §1.7; Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 829-33 (1983) (discussing, from a critical legal studies perspective, the classic contract theory and its continuing influence on modern contract law).

C. *Autonomy Not Reciprocity*

The modification proposed here is referred to as the autonomy paradigm. It applies a more comprehensive conception of individual liberty, including consent to nonreciprocal risks in exchange for benefits, as well as implicit consent to background risks of common activities. This modification allows the autonomy paradigm to explain bargained-for relationships that the paradigm of reciprocity could not. In the case of medical treatment, the patient consents to nonreciprocal risks created by the medical procedure in exchange for the health benefits of the procedure.¹⁰⁵ In premises liability, the licensee, when properly informed of the risks, consents to them in exchange for permission to enter for his own purposes.¹⁰⁶ In products liability, the consumer accepts certain risks of the product in exchange for the product's benefits.¹⁰⁷ The nature of the benefits depends on the tastes and motivations of the individual. Regardless of the form of the benefits, when the individual can be said to have consented to the risks of the product in return for the benefits of the product, the exchange is fair and balanced, even if the risks imposed are unilateral. The autonomy paradigm's broad view of consent allows it to serve as a useful model for resolving bargained-for exchanges, including product liability claims.

IV. PRODUCTS LIABILITY: THE HISTORICAL ROUTE TO THE THIRD RESTATEMENT

The historical development of products liability law, in particular its evolution from contract to tort, is critical to understanding the current state of the law. The evolution and merger of tort and contract law in products liability was motivated by a desire to achieve a balance between fairness and utility.¹⁰⁸ Much of this struggle for fairness has involved an effort to overcome the contractual requirement of privity between the plaintiff and defendant.¹⁰⁹ When the conceptual "shackles of privity"¹¹⁰ were finally

105. See *Howard v. Univ. of Med. & Dentistry of N.J.*, 800 A.2d 73, 78-79 (N.J. 2002) (following the practice in most jurisdictions of treating cases of informed consent or failure to warn as sounding in negligence); *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742, 748 (Pa. 2002) (treating both nonconsensual surgery and lack of informed consent cases as sounding in battery); cf. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing "that a competent person has a constitutionally protected liberty interest in refusing unwanted medical" care).

106. See, e.g., *Houin v. Burger*, 590 N.E.2d 593, 596 (Ind. Ct. App. 1992) (noting that a "landowner also has a duty to warn a licensee of any latent danger on the premises of which the landowner has knowledge").

107. See Owen, *Foundations*, *supra* note 12, at 429-30.

108. See, e.g., William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799-800 (1966) [hereinafter Prosser, *The Fall*].

109. See *id.*

cast off with the adoption of strict liability, the status of the plaintiff was treated as irrelevant and the focus shifted exclusively to the product.¹¹¹ While this “equal” treatment was an improvement, it ignored the important distinction between consumers and bystanders that continues to this day. To understand the inequity that results from this uniform treatment, we must begin at the beginning.

A. *The Privity of Contract Requirement*

Products liability law, born of contract principles, was limited for years by its inability to see beyond the parameters of the express agreement. Well into the twentieth century, the doctrine of *caveat emptor*¹¹² protected the manufacturer from liability when, in the absence of fraud, the buyer had the opportunity to inspect the goods.¹¹³ This was true even with regard to latent defects, likely to go undiscovered by the buyer upon reasonable inspection.¹¹⁴ Assuming equal bargaining power, the doctrine was not regarded as unjust because the buyer, in theory, could require that the seller expressly warrant the quality of the product.¹¹⁵

The problem is that the theory depends upon assumptions that are not mirrored by reality.¹¹⁶ This contract conception of product liability developed in a simpler time when the manufacturers of goods met “face to face on an equal bargaining plane”¹¹⁷ with the purchasers. The goods were often uncomplicated items, perhaps even custom made to the buyer’s specifications, and the buyer was able to

110. *Id.* at 799. Prosser, as was his way, colorfully described the extension of express and implied warranties to the buyer’s family and guests in the home by U.C.C. § 2-318 as loosening the “shackles of privity to some small extent.” *Id.*

111. Both the *Restatement (Second) of Torts* § 402A requirement of a defect and the *Restatement (Third) of Torts: Products Liability* reasonable alternative design (RAD) requirement put the emphasis on the product rather than the relationship between the plaintiff and the defendant.

112. “Let the buyer beware.” BLACK’S LAW DICTIONARY 222 (6th ed. 1990).

113. See *Barnard v. Kellogg*, 77 U.S. 383, 388-89 (1870); *Tampa Shipbuilding & Eng’g Co. v. Gen. Const. Co.*, 43 F.2d 309, 311 (5th Cir. 1930).

114. See *Seixas v. Woods*, 2 Cai. 48, 52-53 (N.Y. 1804). Plaintiff purchased wood sold as brazilletto wood, which is quite valuable, when in fact the wood was another variety of little value. *Id.*

115. See *Barnard*, 77 U.S. at 388-89 (“No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited.”).

116. See *Feinman*, *supra* note 104 (discussing the defects of classic freedom-of-contract theory).

117. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 80 (N.J. 1960).

meaningfully inspect the product.¹¹⁸ As products became more complex and manufacturers utilized mass production, mass marketing, and retail distributors, the contractual model failed to reflect the real world practices in which buyers lack the opportunity and expertise to inspect the products or negotiate for an express warranty.¹¹⁹ This change required a shift from contract law, where the duty is determined by the parties' express agreement, to tort law, where duty is determined by foreseeability of harm.¹²⁰

In recognition of these new realities, *caveat emptor* was gradually replaced by *caveat venditor*.¹²¹ Implied warranties, described by Professor William Prosser as "freak hybrid[s] born of the illicit intercourse of tort and contract," imposed upon sellers, as a matter of law, the obligation to warrant that their products were free from defects, known or unknown, and that they were fit for their ordinary and intended uses.¹²² The rationale for these implied warranties was that the purchaser pays a fair price "in expectation of an adequate advantage, or recompense" in the form of a product free of defects.¹²³

Historically, the requirement of privity applied both vertically, preventing claims against manufacturers by remote purchasers, and horizontally, preventing claims by users of products that were not purchasers. The requirement of privity was originally justified on the basis that the agreement cannot logically extend beyond those who are a party to the agreement.¹²⁴ This strict contractual limitation on liability became increasingly at odds with the way products are actually bought and sold.¹²⁵ Even as implied warranties evolved to reflect the realities of mass produced, complex products and retail distributors positioned between manufacturers

118. *Id.*

119. *See id.* at 80-83.

120. *See* Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 53 AM. L. REG. 337, 353 (1905) (providing an insightful, detailed, and early discussion of the need for a complete change from contract to tort-based liability of manufacturers and seller for injuries resulting from products).

121. "Let the seller beware." BLACK'S LAW DICTIONARY 222 (6th ed. 1990).

122. Prosser, *The Fall*, *supra* note 108, at 800.

123. *Lane v. Trenholm Bldg. Co.*, 229 S.E.2d 728, 730 (S.C. 1976) (quoting *Champneys v. Johnson*, 3 S.C.L. (2 Brev.) 268, 272 (1809)).

124. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842); Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916, 923 (1964) ("In warranty, on the other hand, privity—i.e., the existence of a direct contractual relationship—was a conceptual necessity because the seller's modern obligations for defective products developed as a part of the law of contracts.").

125. Prosser, *The Fall*, *supra* note 108, at 792-93 (discussing *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) and focusing on modern product distribution and marketing as central to the abandonment of the privity requirement in product liability).

and the ultimate consumer of products, the requirement of privity of contract remained.¹²⁶

The privity requirement was also clearly at odds with tort law's focus on foreseeability of harm as the linchpin of liability.¹²⁷ Nevertheless, the privity requirement was applied to negligence claims as well as warranty claims.¹²⁸ In addition to the contract-based benefit of the bargain rationale, the privity requirement was justified as necessary to promote the development of industry and thus further utilitarian goals. As one court explained:

If a . . . manufacturer who constructs a boiler, piece of machinery, or a steam-ship, owes a duty to the whole world, that his work or his machine or his steam-ship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned.¹²⁹

Reasonable minds might dispute the conclusion that the greatest good for the greatest number is maximized by the policy of promoting industry at the cost of the injured party. Yet it is the utilitarian calculus that permits the debate.

Over time, the citadel of privity was progressively riddled with exceptions and ultimately fell under the onslaught.¹³⁰ Early exceptions, premised on the tort concept of foreseeability of harm, were limited to the sale of "imminently" or "inherently" dangerous products like poisons, drugs, guns, explosives, and foodstuffs.¹³¹ In the seminal case of *MacPherson v. Buick Motor Co.*, Judge Cardozo expanded the exception to all negligence claims where the manufacturer foresees danger to persons other than the purchaser.¹³² Of course, the plaintiff still had to prove negligence on the part of the

126. *Id.*; DAVID G. OWEN, PRODUCTS LIABILITY LAW § 4.5 (2d ed. 2008) [hereinafter OWEN, PRODUCTS LIABILITY].

127. See Bohlen, *supra* note 120, at 353-55 ("The duty is not one created by the contract of sale and so restricted to those party thereto, but is a legal incident to the vendor's previous position as manufacturer, a position voluntarily assumed for his own profit, and so extends to all whose safety must depend on his care in manufacture. . . . To encourage commerce and industry by removing all duty and incentive to protect the public is to invite wholesale sacrifice of individual rights on the altar of commercial greed."); RESTATEMENT (SECOND) OF TORTS § 395 cmt. b (1965) (stating that a manufacturer's liability in negligence rests "upon the foreseeability of harm if proper care is not used").

128. See, e.g., *Borg-Warner Corp. v. Heine*, 128 F.2d 657, 658-59 (6th Cir. 1942); see also *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 938-40 (Me. 1982) (in which Maine became the last state to abandon the privity requirement in negligence-based product liability actions).

129. *Curtin v. Somerset*, 21 A. 244, 245 (Pa. 1891).

130. Prosser, *The Fall*, *supra* note 108, at 793 (discussing the history of the privity requirement in product liability and its progressive exceptions culminating in its complete abandonment).

131. See *id.*; OWEN, PRODUCTS LIABILITY, *supra* note 126, § 2.1.

132. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

manufacturer. The privity requirement remained, however, with regard to contract-based express and implied warranty cases.¹³³

B. Strict Liability in Tort

Rather than eliminate the privity requirement in contract-based warranty claims, Dean William Prosser advanced a variety of arguments supporting the imposition of strict liability in tort for injuries caused by defective products. These rationales were applied by Justice Roger Traynor in his famous concurring opinion in *Escola v. Coca Cola Bottling Co.*, upholding a verdict for a waitress injured by a defective Coke bottle that exploded.¹³⁴ Almost twenty years later, Justice Traynor, writing for a unanimous court in *Greenman v. Yuba Power Products, Inc.*, affirmed a verdict for a power tool user injured when the tool vibrated loose allowing a piece of wood he was working on to fly out and strike him on the head.¹³⁵ In so doing, the court rejected the defendant's warranty-based defenses, holding that liability is not dependent upon the law of contract but is imposed by the law of strict liability in tort.¹³⁶

The rationale for the imposition of strict liability in tort, in particular enterprise liability, consists of a mixture of fairness and utilitarian concerns. Inasmuch as the sellers seek to encourage consumers to trust in their product's safety and fitness for ordinary and foreseeable uses, fairness demands that they should stand behind their products when the consumers' expectations are disappointed and they are injured by product defects.¹³⁷ Consumers must rely upon manufacturers to evaluate the product's safety prior to sale because consumers are not capable of performing independent evaluations of modern complex products.¹³⁸ Finally, those that benefit from the risks of the product (i.e., manufacturers, sellers, and consumers) should absorb the cost of injuries rather than the injured party alone.¹³⁹

However, much of the strict liability scholarship and relevant cases focus upon instrumentalist concerns.¹⁴⁰ Manufacturers are in

133. In fact, in some jurisdictions, the privity requirement remains.

134. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

135. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 898-99, 902 (Cal. 1963).

136. *Id.* at 900-01.

137. *Id.* at 901; OWEN, PRODUCTS LIABILITY, *supra* note 126, § 5.4.

138. *Greenman*, 377 P.2d at 901; Keating, *Theory*, *supra* note 12, at 1298-99 (discussing *Greenman v. Yuba Power Prods., Inc.*).

139. Keating, *Theory*, *supra* note 12, at 1286.

140. See, e.g., Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-07 (1961); William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985) (discussing economic efficiency rationales supporting the development of products liability law);

the best position to insure against the risk of product injury and distribute these costs to the consuming public as a cost of production.¹⁴¹ Enterprise liability forces manufacturers to internalize the cost of accidents caused by defective products and thereby creates incentives for the manufacturer to improve product safety.¹⁴² In this way, the cost-benefit analysis is evaluated automatically by the market, and efficiency is achieved.¹⁴³ Efficiency is further enhanced by allowing an injured plaintiff to seek compensation directly from manufacturers rather than retail sellers. Under warranty law, plaintiffs would seek recovery from the retailer and the retailer would seek contribution and indemnification from manufacturers for damages paid to injured purchasers.¹⁴⁴ This circuitous path, often involving successive suits, wasted judicial resources, created the potential for inconsistent verdicts, and increased transaction costs.¹⁴⁵

These instrumentalist and fairness rationales were both key to the American Law Institute's approval of § 402A of the *Restatement (Second) of Torts* in 1966 (*Second Restatement*).¹⁴⁶ Section 402A imposes strict liability on the seller of products to the user or consumer under the following circumstances:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and

George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989) [hereinafter Priest, *Strict*].

141. OWEN, PRODUCTS LIABILITY, *supra* note 126, § 5.4; Albert A. Ehrenzweig, *Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws": II*, 69 YALE L.J. 794 (1960) (analyzing the effect of the insurance and risk distribution rationales of enterprise liability to conflict of law issues).

142. See, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 442 (Cal. 1944); Calabresi, *supra* note 140, at 502 (As Professor Calabresi explains, in theory, this also enhances autonomy by allowing the consumer to "cast an informed vote in making his purchases."); George L. Priest, *The Modern Transformation of Civil Law*, 54 BUFF. L. REV. 957, 958 (2006).

143. See Calabresi, *supra* note 140; Priest, *supra* note 142.

144. See, e.g., *Escola*, 150 P.2d at 442; William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1123-24 (1960) [hereinafter Prosser, *Assault*].

145. See, e.g., *Escola*, 150 P.2d at 442; Prosser, *Assault*, *supra* note 144, at 1124.

146. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹⁴⁷

The effect of § 402A was to provide warranty protection to users and consumers without any of the contractual-based privity limitations.¹⁴⁸ While it imposed strict liability, it did not make the seller of the product an insurer of all harm that results from the uses of the product. Liability was limited to harm caused by a product “defect” that rendered the product unreasonably dangerous to the user or consumer.¹⁴⁹ Comment (g) specified that the rule only applied where the product leaves the seller’s hands “in a condition not contemplated by the ultimate consumer,” which renders it “unreasonably dangerous to him.”¹⁵⁰ As explained in Comment (i), a product was unreasonably dangerous when it was “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchase[d] it, with the ordinary knowledge common to the community as to its characteristics.”¹⁵¹ These comments led to the development of what came to be known as the *consumer expectation* test.¹⁵²

C. Consumer Expectations to Reasonableness

The criticisms of the consumer expectation test are legion and began almost immediately.¹⁵³ The test is largely the result of the contract-based implied warranty roots from which strict products liability developed.¹⁵⁴ Contract law is concerned fundamentally with protecting the reasonable expectations induced by the bargained-for exchange.¹⁵⁵ The consumer expectation test was simple enough to apply to manufacturing defects where the consumer expected the product to conform to the intended design of the product.¹⁵⁶ However,

147. *Id.* § 402A (emphasis added).

148. *Id.* § 402A cmt. m.

149. *Id.* § 402A cmt. g.

150. *Id.*

151. *Id.* § 402A cmt. i.

152. See, e.g., *Lunt v. Brady Mfg. Corp.*, 475 P.2d 964, 966 (Ariz. Ct. App. 1970); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 247 N.E.2d 401, 403 (Ill. 1969).

153. See, e.g., Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1235-37 (1993); Reed Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967); David A. Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Montgomery & Owen, *supra* note 89.

154. OWEN, PRODUCTS LIABILITY, *supra* note 126, § 5.6 (discussing the warranty roots of the test).

155. See 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.1 (rev. ed. 1993).

156. Owen, *Foundations*, *supra* note 12, at 467 (“[W]hile consumers may abstractly comprehend the practical necessity of allowing imperfect production, their actual expectation when purchasing a new product is that its important attributes will match those of other similar units.”).

when the product was in the precise condition the manufacturer intended, it was far from clear how the consumer expectation test should apply. Indeed, as numerous commentators have recognized, the drafters of § 402A did not formulate this test with the intent that it would be applied to design defect claims.¹⁵⁷

The problems of the consumer expectation test were particularly acute where the product design feature involved a sophisticated and technologically complex product about which the consumer had little understanding and only the most general expectations regarding performance and safety.¹⁵⁸ To illustrate this problem, Professor Twerski discussed a claim involving an injury caused when the driver's seat of the plaintiff's Ford Navistar collapsed following a rear end collision with a 53,000 pound dump truck traveling at thirty miles per hour.¹⁵⁹ Ford maintained that the seat was designed with a less rigid structure intended to yield and thereby reduce injuries to occupants in more common, lower impact collisions.¹⁶⁰ This design choice involved a compromise between risks that was almost certainly unknown to the consumer. How should the consumer expectation test be applied to such a design compromise between risks? Do consumers expect that seats are designed to provide the greatest protection in the most severe collisions or the most probable collisions? Do consumers have *any* expectations regarding the seat design? Whatever design is implemented, those whose injuries could have been reduced by the selection of the alternative design could claim their expectations were not met.¹⁶¹ In either case, can one say the actual risks associated with the product were greater than those that the consumer expected? The standard leaves tremendous

157. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1526 (1992) ("No one, for example, could have foreseen that language written primarily to govern manufacturing defect cases might be used by courts in design and warning defect cases."); Kysar, *supra* note 24, at 1712-14 (discussing the limited authority for consumer expectations analysis in design defect claims at the time of the drafting of § 402A and the lack of guidance the *Second Restatement* comments provide for formulating a workable standard for determining consumer expectation or justifying the standard and citing other authority for the same); Priest, *Strict*, *supra* note 140, at 2303 (stating that the founders of § 402A thought it would apply only to manufacturing defects and assumed that design defect cases would be controlled by negligence law).

158. See *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 447, 454-55 (Cal. 1978) (adopting a consumer expectation test for simple design issues and a risk utility test for complex designs but shifting the burden to the defendant to prove that the design was not defective); see also *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994).

159. Aaron D. Twerski, *In Defense of the Products Liability Restatement: Part I*, 8 KAN. J.L. & PUB. POL'Y 27, 31 (1998). The hypothetical is based upon the facts of an unpublished case before the Missouri Supreme Court. See *id.*

160. *Id.*

161. *Id.*

discretion to the jury and provides little guidance to aid them in their design defect determination.¹⁶²

In other cases, the consumer expectation test seemed to work against the goals of strict liability. For example, if a product contains a dangerous design feature readily apparent to the consumer, is the consumer denied recovery even where the hazard could have been cheaply and simply reduced or eliminated by a change in design? On one hand, it is hard to see how the consumer did not expect the dangers of an open and obvious hazard.¹⁶³ Indeed, some courts held that the test precludes recovery where the dangerousness of the product did not exceed the risk contemplated by the consumer despite the availability of a reasonable alternative design.¹⁶⁴ On the other hand, such a literal interpretation of the test frustrates the goal of encouraging manufacturers to improve product safety by reducing risk when it is feasible to do so.¹⁶⁵ In order to allow recovery for the open and obvious hazards of a product design, other courts have held that the obvious nature of the hazard is just one factor to be considered in determining if the product is unreasonably dangerous.¹⁶⁶ It could be argued that consumers expect manufacturers will incorporate safer alternative designs despite the consumer's awareness of the hazard presented by the actual design.¹⁶⁷

Prompted by the difficulty of applying the consumer expectation test to design defect claims, Professors James Henderson and Aaron Twerski urged the adoption of an alternative test for liability.¹⁶⁸ The American Law Institute agreed that revisions to § 402A were necessary and appointed Professors Henderson and Twerski as

162. See *id.* ("To use the consumer expectations test as a standard of liability in a design defect case is just plain silly.").

163. Phillips, *supra* note 24, at 1049-52 (arguing that barring claims based upon obvious product hazards results from an unnecessarily narrow conception of expectations).

164. See, e.g., *Chaney v. Hobart Int'l, Inc.*, 54 F. Supp. 2d 677, 681 (E.D. La. 1999) (stating that the hazards of a meat grinder without a feed pan guard are open and obvious to the consumer); *Irion v. Sun Lighting, Inc.*, No. M2002-00766-COA-R3-CV, 2004 WL 746823, at *16 (Tenn. Ct. App. Apr. 7, 2004) (holding that the dangers of a torchiere style halogen light was obvious to the ordinary consumer despite evidence of a reasonable alternative design consisting of a wire guard placed over the bulb); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794, 799 (Wis. 1975) (stating that the hazard of a swimming pool to a two-year-old child is obvious to the consumer so no liability exists for failure to include a self-latching gate).

165. See, e.g., *Palmer v. Massey-Ferguson, Inc.*, 476 P.2d 713, 719 (Wash. Ct. App. 1970) ("The manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one."); Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043, 1088 (1994) (noting that the consumer expectation test has been applied by courts as a tool to apply the open and obvious danger rule in contravention of the goals of strict liability).

166. See, e.g., *Carpenter v. Koehring Co.*, 391 F. Supp. 206, 210-12 (E.D. Pa. 1975).

167. See Phillips, *supra* note 24, at 1049-1051 (suggesting that consumers expect that manufacturers will make their products safe despite patent dangers).

168. Henderson & Twerski, *supra* note 157, at 1514-26.

reporters for the products liability provisions of the *Restatement (Third) of Torts*, the final draft of which was approved in May 1997.

V. FAIRNESS AND UTILITY IN THE *RESTATEMENT (THIRD) OF TORTS*:
PRODUCTS LIABILITY

The *Restatement (Third) of Torts: Products Liability* recognizes three broad categories of product defects: manufacturing defects, warning defects, and design defects.¹⁶⁹ The standard for imposing liability is distinct for each of these three categories. While strict liability is retained for manufacturing defects, strict liability has been rejected in favor of a risk-utility balancing test for warning and design defect claims. This dramatic departure from strict liability has resulted in substantial criticism that the *Third Restatement* is industry friendly and has abandoned the fairness concerns that gave birth to strict products liability.¹⁷⁰

The next section examines the three categories of product defect as stated in the *Third Restatement* from the perspective of both the autonomy paradigm and the paradigm of reasonableness. Despite the abandonment of strict liability for warnings and design defect claims, this analysis reveals that the *Third Restatement* seeks to balance fairness and utility, and generally succeeds. The one glaring exception is when bystanders are injured by the inherent risks of certain socially useful products. As discussed in Part VI, further reform to the *Third Restatement* is necessary to provide for a fair and balanced treatment of bystanders injured by these products.

A. *Manufacturing Defects*

Under the *Third Restatement*, a product “contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.”¹⁷¹ This category of product defect is the only one for which the *Third Restatement* imposes strict liability.¹⁷² Common examples of manufacturing defects include products that are contaminated, physically flawed, damaged, or incorrectly assembled.¹⁷³ A manufacturer is liable for injuries caused

169. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998). The *Third Restatement* also recognizes distinct product categories and standards of liability for prescription drugs, medical devices, and used products. *Id.* §§ 6, 8. These categories may raise additional fairness concerns that are not specifically addressed by this Article. However, the same analysis could be applied.

170. See, e.g., sources cited *supra* note 24.

171. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1998).

172. *Id.* § 2 cmt. a.

173. *Id.* § 2 cmt. c.

by a manufacturing defect even when reasonable care is exercised in manufacturing, testing, and inspecting the product.

Just as the reasonableness paradigm cannot account for strict liability for ultrahazardous activities, it also cannot account for the persistence of strict liability in manufacturing defect cases. The selection of raw materials, the manufacturing process, testing, assembly, and quality control all involve considerable risk-utility considerations on the part of the manufacturer. For example, failure to implement reasonable but costly inspection procedures could result in a manufacturing defect going undetected and injuring the consumer.¹⁷⁴ But even if the manufacturer could have prevented the manufacturing defect from reaching the consumer only through extraordinary precautions that would be cost prohibitive under a reasonableness analysis, the manufacturer is still liable for harms caused by the defect.¹⁷⁵

Consider, for example, the case in which the wire strands designed to hold an automobile tire securely to the wheel's flange contained a manufacturing defect that caused the pressurized tire to blow over the tire flange and injure the plaintiff.¹⁷⁶ If the defect could be detected by a visual or tactile inspection of the product, a reasonable manufacturer might inspect for such a defect, given the probability of harm in the event of the defect. If the defect were exceedingly rare, however, and could be detected only by a prohibitively costly x-ray inspection of the wire strands, the reasonableness paradigm would not impose liability for harm caused by the failure to implement such inspections. To impose liability under such circumstances would be an inefficient use of resources. The consumer would have to pay more for the tires (as the inspection costs are passed through) without receiving a commensurate increase in security.

In contrast, the autonomy model is descriptively simple and nicely explains the imposition of liability under both scenarios regardless of the efficiency concerns. Returning to the tire explosion scenario, the consumer is aware of certain risks associated with the use of an automobile and its tire components. He is aware that the tire will lose tread and traction over time. If he drives over curbs or nails, the tire may become damaged or deflated and cause him to lose control of his vehicle and possibly cause him injury. He may even be aware that

174. *Id.* § 2 cmt. a. Utilitarian concerns may also be furthered to the extent that strict liability encourages manufacturers to implement reasonable manufacturing and inspecting procedures knowing that they may be held liable for all injuries resulting from design defects even if it would be impossible for the plaintiff to identify the faulty procedure that allowed the defect to reach the consumer. *Id.*

175. *Id.*

176. *See Dico Tire, Inc., v. Cisneros*, 953 S.W.2d. 776, 784 (Tex. App. 1997).

if he grossly overinflates the tire, it could explode and cause him injury.¹⁷⁷ All of these risks are nonreciprocal in that the plaintiff does not impose commensurate risks on the tire manufacturer. But liability is not imposed for these expected risks. Yet the autonomy of the individual is preserved because he has waived a degree of security in exchange for the benefits of the tire. He has implicitly consented to these expected risks and presumably has determined that the exchange is fair.

However, if the manufacturer produces a tire that is defective because it does not conform to the intended design, the consumer's expectations are disappointed and his security has been compromised to a greater degree than that to which he consented. Indeed, consumers expect certain risks associated with the use of all products. When using a carving knife to carve the Thanksgiving turkey, for example, the consumer has accepted certain risks, including the possibility that he might be cut by the sharp knife.¹⁷⁸ These risks are accepted in exchange for the benefits of having a sharp knife. However, if the consumer is cut when the knife's handle snaps due to a manufacturing defect, he has been exposed to a risk beyond that to which he consented when he purchased and used the product.¹⁷⁹ Accordingly, the consumer did not receive a fair exchange of risks and benefits, and liability is imposed regardless of fault.

Yet the failure of the reasonableness paradigm to justify the imposition of strict liability for manufacturing defects does not mean that the *Third Restatement* fails to account for the demands of social utility. The imposition of liability does not force the manufacturer to implement inefficient manufacturing and inspection practices; instead, the manufacturer must pay for the harms that result from the processes selected. The manufacturer can pass these costs on to consumers of the nondefective products who have determined that the benefits of the product justify its higher price as well as the risks associated with the use of the product in its intended design.¹⁸⁰

B. Warning Defects

While strict liability is imposed for manufacturing defects, liability for warning or informational defects claims are imposed only

177. Such knowledge could result from common experience as evidenced by consumer expectations or warnings supplied by the manufacturer.

178. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 630 (1992) (noting that although the Consumer Products Safety Commission reports over 417,000 knife injuries a year, almost no product liability claims are brought because consumers appreciate the risks).

179. See *Nugent v. Utica Cutlery Co.*, 636 S.W.2d 805 (Tex. App. 1982). In *Nugent*, a knife blade broke and flew into plaintiff's eye while stripping heavy gauge wire. *Id.* The jury refused to find a manufacturing defect, presumably because the knife was misused. *Id.*

180. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998).

after a finding of fault under the *Third Restatement*.¹⁸¹ The Restatement provides that a product “is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe.”¹⁸² Although a single definition of warning defect is defined in § 2(c), it is clear from Comment (i) that the *Third Restatement* recognizes two distinct warning requirements: risk-reduction warnings and informed-choice warnings.¹⁸³

1. Risk-reduction Warnings

Risk-reduction warnings inform the user how to avoid or reduce the risk of product hazards. For example, informing the user that eye protection should always be worn when using the product is a typical risk-reduction warning. With regard to risk-reduction warnings, the *Third Restatement* adopts a risk-utility test virtually indistinguishable from negligence.¹⁸⁴ Nevertheless, both the paradigm of reasonableness and the autonomy paradigm account for these risk-reduction warnings in product liability cases. Even where the utility of the product justifies the risk from a social welfare perspective, the product must have adequate warnings or instructions for use that will allow the user to avoid or reduce the dangers.¹⁸⁵ This requirement is consistent with the reasonableness paradigm because making the use of the product safer enhances social welfare by decreasing the costs of the product’s use, while still retaining the product’s utility.¹⁸⁶

However, autonomy is also protected by providing information to the user of the product that will allow the user to make informed decisions about waiving a certain degree of security in exchange for the benefit of using the product.¹⁸⁷ Similarly, if the product does not contain adequate warnings or instruction, the autonomy paradigm imposes liability because the user of the product was exposed to a

181. *Id.*

182. *Id.* § 2(c).

183. *See id.* § 2 cmt. i.

184. *Id.* § 2 cmt. d.

185. *Id.*

186. *See id.*; *see, e.g.*, *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 741 (6th Cir. 2000) (applying Michigan law to a suit alleging that a shirt was defective because the manufacturer failed to warn of the shirt’s dangerous flammability).

187. *See Madden, supra* note 12, at 1059-67 (discussing how the *Third Restatement* section on warning defects balances both corrective justice and economic efficiency concerns).

risk that was not consented to in exchange for the benefits sought from the product.¹⁸⁸

2. *Informed-choice Warnings*

The *Third Restatement* also imposes liability where the product contains risks of use that are inherent in the product and might not be avoidable or reduced as a result of the warning provided.¹⁸⁹ These types of warnings are known as informed-choice warnings because they allow the user to make an autonomous choice whether to confront the danger or avoid it by choosing not to use the product.¹⁹⁰ This rationale is expressly discussed in Comment (i) to § 2 of the *Third Restatement*:

In addition to alerting users and consumers to the existence and nature of product risks so that they can, by appropriate conduct during use or consumption, reduce the risk of harm, warnings also may be needed to inform users and consumers of nonobvious and not generally known risks that unavoidably inhere in using or consuming the product. Such warnings allow the user or consumer to avoid the risk warned against by making an informed decision not to purchase or use the product at all and hence not to encounter the risk. In this context, warnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product. Whether or not many persons would, when warned, nonetheless decide to use or consume the product, warnings are required to protect the interests of those reasonably foreseeable users or consumers who would, based on their own reasonable assessments of the risks and benefits, decline product use or consumption.¹⁹¹

These warnings are distinct from risk-reduction warnings that inform the user how to avoid or reduce the risk of hazard while using the product.

The autonomy paradigm clearly accounts for the requirement of additional, nonutilitarian warnings. These warnings provide users of

188. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (1998). The *Third Restatement* also provides that a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. *Id.* cmt. j. See Madden, *supra* note 12, at 1037, for a detailed analysis of the balancing of autonomy and utility in this provision, with which I concur.

189. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (1998).

190. See JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY PROBLEMS & PROCESS 352 (6th ed. 2008) (providing a detailed discussion of the distinction between risk-reduction warnings and informed-choice warnings as well as the distinct rationales, utilitarian for the former and individual rights for the latter, justifying the two types of warning).

191. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (1998).

the product with knowledge of the product's dangers that allow them to make informed individual decisions regarding the degree of risk they are willing to encounter regardless of the utility of the product.¹⁹² The only purpose for the warning is to allow users to make a subjective determination as to whether the risks are worth the benefits, regardless of the objective risk-utility calculation that might be made from the social welfare reasonableness paradigm.¹⁹³ It allows users to decline to use even efficient products because they are unwilling to waive their right to be free from the additional risks.¹⁹⁴ Accordingly, the autonomy paradigm provides a clear rationale for these informed-choice warnings while the reasonableness paradigm cannot.

These informed-choice warnings are widely recognized in products liability cases and have been particularly prevalent in claims involving prescription drugs and toxic materials.¹⁹⁵ For example, in *Borel v. Fibreboard Paper Products Corp.*, the plaintiff contracted asbestosis as a result of working with asbestos insulation.¹⁹⁶ In this early asbestos case, the court acknowledged that "[t]he utility of an insulation product containing asbestos may outweigh the known or foreseeable risk."¹⁹⁷ Nevertheless, the court held that the manufacturer had a duty to warn of the hazard because the worker had a right to decide whether to be exposed to the risk even if the manufacturer could not otherwise reduce the hazard.¹⁹⁸

Pharmaceutical cases based upon failure to provide informed-choice warnings often have presented insurmountable evidentiary

192. *Id.*

193. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) ("The rationale for this rule is that the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself to the risk of harm. Thus, a true choice situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.").

194. See David E. Bernstein, *Learning the Wrong Lessons From "An American Tragedy": A Critique of the Berger-Twerski Informed Choice Proposal*, 104 MICH. L. REV. 1961 (2006). Professor Bernstein has argued informed choice warnings impose serious costs on society by causing consumers to avoid useful products because of unrealistic or disproportionate fears. For example, some parents refuse to vaccinate their children because of unsubstantiated claims that a preservative in the vaccines causes autism. *Id.* at 1977.

195. See generally Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking Daubert*, 104 MICH. L. REV. 257 (2005) (discussing the application of informed-choice warnings to pharmaceutical and toxic tort claims).

196. *Borel*, 493 F.2d at 1081.

197. *Id.* at 1105.

198. *Id.* at 1105-06. While the reader, armed with today's knowledge of the incredible harm caused by asbestos, may dispute that a risk-utility analysis could weigh in favor of the use of asbestos-containing products, the general problem of hidden dangers within socially useful products is not readily disputable. In fact, an EPA ban on asbestos-containing products was struck down because of the failure to properly consider the risk and benefits of asbestos compared to alternative products. See *Corrosion Proof Fittings v. Evtl. Prot. Agency*, 947 F.2d 1201, 1222-23 (5th Cir. 1991) (striking down the EPA's asbestos ban).

hurdles for plaintiffs in terms of establishing scientific proof of causation.¹⁹⁹ While the *Third Restatement* does not provide an independent cause of action that allows plaintiffs to recover for the failure to provide informed-choice warnings where proof of causation is lacking, such an independent cause of action has been suggested.²⁰⁰ Professors Berger and Twerski conclude that the tremendous hurdles presented by *Daubert's* reliability requirements,²⁰¹ and the associated costs of litigation, render it impossible to prove causation in many pharmaceutical cases.²⁰² The solution they propose is a cause of action that would compensate the plaintiff, not for the unproven drug-related injury, but for the deprivation of the right to make an autonomous decision regarding the use of the product caused by the failure to warn of scientifically uncertain but material risks.²⁰³ The cause of action would be similar to negligent infliction of emotional distress, and the plaintiff would be permitted to recover dignitary tort damages for the loss of the right to autonomous decisionmaking.²⁰⁴ Such a cause of action cannot be justified by the reasonableness paradigm because, from an objective risk-benefit analysis, the product's known risks are outweighed by its perceived benefits. However, the autonomy paradigm supports such a cause of action because individual consumers should have the right to make subjective determinations about whether they are willing to consent to the risks in exchange for the benefits of the drug.

While most informed-choice warning claims have involved toxic torts and pharmaceutical products, the theory has been extended to other products liability cases where these evidentiary issues are less burdensome. In *Watkins v. Ford Motor Co.*, for example, the plaintiffs were injured following the rollover of a 1986 Ford Bronco II.²⁰⁵ Plaintiffs claimed that Ford failed to warn of the substantial stability problems associated with the Bronco II, despite knowledge of the vehicle's propensity to roll over even at low speeds.²⁰⁶ Ford's expert maintained that no warning could have prevented the rollover that occurred because the plaintiff was confronted with the need for an emergency maneuver that was necessary regardless of the operator's knowledge of the potential for a rollover.²⁰⁷ The court rejected this

199. See Berger & Twerski, *supra* note 195, at 258. See Bernstein, *supra* note 194, for a critical response to this article.

200. See Berger & Twerski, *supra* note 195, at 259.

201. See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

202. See Berger & Twerski, *supra* note 195, at 264-67 (discussing the paucity of pre-approval studies, the rejection of animal studies, and the numerous reasons courts find to reject expert opinions based upon epidemiological studies).

203. *Id.* at 282-87.

204. See *id.*

205. *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1215 (11th Cir. 1999).

206. *Id.* at 1219.

207. *Id.*

argument, noting risk reduction was only one purpose of product warnings.²⁰⁸ The court recognized that a more fundamental purpose of such a warning is to allow consumers to make informed decisions whether to use the product in the first instance.²⁰⁹ Such warnings allow users to decline to use even the most efficient products where they are unwilling to waive their right to be free from the additional risks.²¹⁰ Under the facts of the case, *Watkins* is an example of an informed-choice warning; because the emergency maneuver was unavoidable, the warning could not have prevented the accident through safer use. The warning could have prevented the accident only if the plaintiff, so warned, chose not to purchase the product.

Many other cases involve warnings that serve both to reduce risk as well as to protect autonomous decisionmaking. For example, manufacturers of three-wheeled all-terrain vehicles (ATVs) incurred tremendous liability as a result of the propensity of ATVs to flip over causing serious injuries to the riders.²¹¹ While the ATVs probably were defectively designed under a risk-utility analysis,²¹² the manufacturers also failed to properly warn consumers of the inherent danger of rollovers.²¹³ Such warnings would not only help users to avoid injury by exercising extreme care but would also enable them to make an informed choice about whether they wished to confront the risk in the first instance.²¹⁴

The debate continues as to whether manufacturers should be strictly liable for failure to warn of dangers that they reasonably could not have foreseen.²¹⁵ The trend in most jurisdictions, and the position taken by the *Third Restatement*, is that the duty to warn is limited to those risks of which the manufacturer had knowledge or

208. *Id.*

209. *Id.*

210. See *supra* note 194 and accompanying text.

211. Sidney Shapiro, Ruth Ruttenberg & Paul Leigh, *The Social Costs of Dangerous Products: An Empirical Investigation*, 18 CORNELL J.L. & PUB. POL'Y 775, 816 (2009) (reporting that the average value of claims settled by Honda, the largest manufacturer of three-wheel ATVs, for accidents between 1978 and 1988 was \$859,003 and that Honda had paid \$84 million in settlements through 1990).

212. *Id.* at 815 (discussing the dangerous design aspects of three-wheel ATVs).

213. See Consumer Products Safety Comm'n, *ATV Action Plans* (2008), <http://www.cpsc.gov/about/cpsia/atvactionplan.pdf> (providing links to the consent decrees); Gary T. Ford & Michael B. Mazis, *Informing Buyers of Risks: Analysis of the Marketing and Regulation of All Terrain Vehicles*, 30 J. CONSUMER AFF. 90 (1996) (discussing the manufacturer's failure to warn consumers of the inherent dangers of three-wheel ATVs and analyzing the effectiveness of the 1988 consent decree between the Department of Justice and the ATV manufacturers which required numerous advertising, warning, and training measures).

214. See *Ogozaly v. Am. Honda Motor Co. Inc.*, 67 Pa. D. & C.4th 314, 319-20 (Pa. C.P. Lackawanna Cnty. 2004) (discussing a dispute between Honda and U-Haul over informed choice warnings U-Haul added to Honda ATVs it leased to consumers).

215. See Wertheimer, *supra* note 24.

reasonably should have had knowledge.²¹⁶ This approach, despite the strict liability misnomer used by some courts, is identical to a negligence approach and fits well within the reasonableness paradigm.

But the imposition of strict liability for failure to warn even of unknowable risks remains the law in some jurisdictions.²¹⁷ This approach cannot be justified by the reasonableness paradigm because it imposes liability even when the reasonable defendant could not take the unknown risk into account when preparing product warnings. The autonomy paradigm, however, does account for the imposition of liability for unknowable risks because the consumer does not consent to these risks. As between the manufacturer and the consumer, the manufacturer, as the expert, is in the best position to discover these dangers and should compensate the consumer for the loss that its product causes.²¹⁸ Manufacturers can test the product and have profited from the sale of the product.²¹⁹ They can also spread the cost of the harm to all of those that continue to find utility in the product despite its newly discovered dangers.

C. Design Defects

Certainly, no area of products liability law has been the subject of more controversy or confusion than the proper standard for liability in claims involving design defects. Faced with the difficulty of applying the amorphous consumer expectation test of § 402A, commentators and the courts quickly turned to the more familiar, and seemingly more precise,²²⁰ risk-utility test common to

216. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m (1998) ("Unforeseeable risks arising from foreseeable product use or consumption by definition cannot specifically be warned against. Thus, in connection with a claim of inadequate design, instruction, or warning, plaintiff should bear the burden of establishing that the risk in question was known or should have been known to the relevant manufacturing community. The harms that result from unforeseeable risks—for example, in the human body's reaction to a new drug, medical device, or chemical—are not a basis of liability.").

217. See, e.g., *Johnson v. Raybestos-Manhattan, Inc.*, 740 P.2d 548, 549 (Haw. 1987); *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1142 (Mont. 1997); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 732 (Wis. 2001); see also Wertheimer, *supra* note 24, at 900-06.

218. Wertheimer, *supra* note 24, at 902 (citing *Green*, 629 N.W.2d at 754-55).

219. See *Green*, 629 N.W.2d at 750 ("[T]he primary 'rationale underlying the imposition of strict liability on manufacturers and sellers is that the risk of the loss associated with the use of defective products should be borne by those who have created the risk and who have reaped the profit by placing a defective product in the stream of commerce.'" (quoting *Kemp v. Miller*, 453 N.W.2d 872 (Wis. 1990)); *Korzec*, *supra* note 24, at 242 (noting that "the manufacturer still profits at the expense of the injured consumer from a product containing unknowable or undiscoverable product defects").

220. Fletcher, *Fairness and Utility*, *supra* note 13, at 571 ("In assessing the reasonableness of risks, lawyers ask many seemingly precise questions One can speak of formulae, like the Learned Hand formula, and argue in detail about questions of costs, benefits and trade-offs. This style of thinking is attractive to the legal mind." (footnote omitted)).

negligence.²²¹ While these tests vary in their formulation, they invariably resemble some form of cost-benefit calculus. This utilitarian test for design defects has been embraced as the sole test by the *Third Restatement*.²²² Specifically, the *Third Restatement* provides that a product “is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”²²³ The requirement of a reasonable alternative design (RAD) involves establishing that the proposed alternative design reduces or eliminates the hazard while not creating other hazards, at a reasonable cost both in terms of product price and utility.²²⁴ Consumer expectations may be considered in the risk-utility calculus (particularly where consumer expectations are influenced by product marketing), but they cannot prevail where the utilitarian balance weighs in favor of the product design feature that injured the plaintiff or where the plaintiff fails to produce evidence of a RAD.²²⁵ In short, the plaintiff must build a better mousetrap, automobile, or drill press as the case may be.

The *Third Restatement*’s RAD test mirrors the reasonableness paradigm even more clearly than does the typical negligence claim. In most jurisdictions, jurors are instructed that negligence is the failure to exercise reasonable care for the safety of others under the circumstances of the case.²²⁶ This leaves tremendous latitude for the jury to determine what factors to consider and how to weigh these factors in determining if the conduct created an unreasonable risk of harm.²²⁷ The *Third Restatement*’s test expressly incorporates the

221. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d reporters’ note II.A. (1998) (citing *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372, 378-79 (Mich. 1982); *Voss v. Black & Decker Mfg.*, 450 N.E.2d 204, 208 (N.Y. 1983); *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979)); *id.* at II.B. (citing *Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983); *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1286 (Me. 1988); *Claytor v. Gen. Motors Corp.*, 286 S.E.2d 129, 132 (S.C. 1982)).

222. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

223. *Id.*

224. *Id.* § 2 cmt. f.

225. *Id.* § 2 cmt. g.

226. See, e.g., *Patterson v. Cushman*, 394 P.2d 657, 658 n.1 (Alaska 1964) (approving jury instructions that defined negligence as “the want of ordinary care; that is, the want of such care as an ordinarily reasonable and prudent person would exercise under like circumstances”); MODEL JURY INSTRUCTIONS COMMITTEE, VIRGINIA MODEL JURY INSTRUCTIONS—Civil 4.000 (2009) (“Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.”).

227. See generally Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000) (arguing that negligence law’s reasonable person standard does not require and should not be understood as compelling a neoclassical economics’ efficiency maximizing actor but includes consideration of broad virtues including prudence and concern for the safety of others); Lyons, *supra* note 12

Learned Hand calculation²²⁸ and instructs the jury on the RAD requirement.²²⁹ The test's exclusive focus on utilitarian concerns subjects it to the same fundamental criticism Fletcher found repugnant with the application of the reasonableness paradigm to negligence-based claims. The RAD test for design defects seeks to resolve a private dispute between a product manufacturer and an injured consumer by considering what is most efficient for society rather than what is just between the parties.²³⁰ Where a plaintiff is injured as the result of a dangerous but socially beneficial product design, the plaintiff must bear his or her injuries without compensation.²³¹

Nevertheless, both the autonomy paradigm and the RAD test of the *Third Restatement* result in similar outcomes in many design defect cases involving injury to users and purchasers of products. Assume, for example, that the plaintiff purchases a compact car and is injured in a collision when he loses control and strikes a tree.²³² Additional safety features would significantly increase the car's weight, reduce fuel economy, and increase production costs and the purchase price.²³³ Accordingly, although the alternative design is safer for the driver, the increase in cost and loss in fuel efficiency could outweigh the improvement in safety under the RAD test.²³⁴

Similarly, as long as the risks and benefits of compact cars are known to consumers, the autonomy paradigm would also deny compensation under these circumstances. The consumer consents to the greater risk of the compact car in exchange for the benefits of less expensive transportation. He may also seek other benefits such as using fewer scarce resources, producing less pollution, and having the convenience of a vehicle that is easy to park. Whatever the perceived benefits, the consumer has received what he considers a fair exchange of risks for benefits. The risk-benefit exchange was consented to by the consumer, and liability is not imposed.

Consider another example where both the RAD test and the autonomy paradigm would impose liability. At night, a young child

(discussing various noneconomic factors the finder of fact should consider in determining whether a defendant's conduct was reasonable).

228. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. a reporters' note (1998) (citing David Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 754-55 (1996)); see also Twerski, *supra* note 159, at 31 ("The risk utility test has its origin in the Learned Hand test for negligence.").

229. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998) ("[P]laintiff must prove that a reasonable alternative design would have reduced the foreseeable risks of harm . . .").

230. See *id.*

231. Fletcher, *Fairness and Utility*, *supra* note 13, at 542.

232. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f, illus. 9 (1998).

233. See *id.*

234. See *id.*

trips over the electrical cord of a hot-water vaporizer on her way to the bathroom.²³⁵ As a result, the vaporizer tips over, spilling the hot water on her and causing serious burns.²³⁶ The plaintiff produces evidence of an alternative vaporizer design in which the water container is firmly secured to the rest of the unit.²³⁷ As long as the alternative design does not unreasonably increase the cost of the vaporizer or significantly decrease its utility, the *Third Restatement's* RAD test would impose liability on the manufacturer of the product.²³⁸

The autonomy paradigm would also impose liability in the vaporizer scenario. It does so because of the realities of the consumer marketplace in which consumers cannot and do not possess the design expertise of the manufacturer. The same rationales that lead to the creation of implied warranties of merchantability support liability under the autonomy paradigm. While the consumer expects certain risks associated with the use of any product, she also expects that the manufacturer of the product has employed its superior expertise and knowledge to create a design that reduces the risk of the product without impairing its utility or increasing its cost.²³⁹ If the manufacturer fails to do so, the consumer does not receive a fair exchange of risks for benefits, and liability should be imposed on the defendant.²⁴⁰ As applied to users and consumers, the RAD test can be justified by both the reasonableness model and the autonomy model.

Yet something important may have been lost in the change from the consumer expectation test to the RAD requirement. However valid the theory behind the RAD test, ultimately the courts and juries must apply the test to the often complex facts of the case. Undoubtedly, the algebraic Learned Hand formula appeals to those who seek to infuse the law with objective scientific principles.²⁴¹ Imposing liability based upon evidence of a RAD seems to place the law on a more solid footing than establishing mere consumer expectation.²⁴²

However, the factors weighed in the Learned Hand formula are, if anything, more ethereal and incapable of precise quantification than

235. *Id.* illus. 6. This illustration is apparently based upon the facts in *McCormack v. Hanksraft Co.*, 154 N.W.2d 488 (Minn. 1967).

236. *Id.*

237. *See id.* illus. 7.

238. *See id.*

239. *See, e.g., Korzec, supra* note 24, at 236 (discussing consumer expectations in terms of consumer entitlement to safety rather than actual knowledge of the product risks).

240. *See id.* at 240 (Consumers pay for safety assurance in the product price and are entitled to receive the benefit of the bargain.).

241. Fletcher, *Fairness and Utility, supra* note 13, at 571 (discussing the appeal of the "seemingly precise questions" posed by the Learned Hand formula but suggesting that the precision is illusionary).

242. *Id.*

consumer expectations.²⁴³ Judges and jurors typically have no training in the complex sciences and engineering principles employed in product designs. As a result, they are largely dependent upon the testimony of experts retained by the parties to explain the relative advantages and risks of the existing design and the RAD.²⁴⁴ The finder of fact is often charged with resolving conflicting expert testimony but is clearly ill-equipped to do so.²⁴⁵ The degree of utility provided by both the existing design and the proposed alternative design is impossible to place into precise values.²⁴⁶ Such analysis raises polycentric problems because a proposed RAD that reduces the risk of one hazard may enhance the risk of another hazard.²⁴⁷

The problem is further compounded where the existing product design creates risks of harm unrelated to the harm that injured the plaintiff. Evidence of design dangers unrelated to the harm that caused the plaintiff's injury are often excluded as not being substantially

243. See Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions For Defectively Designed Products*, 61 TENN. L. REV. 1189, 1192 n.24 (1994) ("Though valuable in analysis involving quantifiable economic costs, it is quickly rendered into inescapable quagmires of conflicting values when applied in settings involving non-monetary consequences, such as environmental disputes and disputes over loss of life and personal injury. Even the most expensive analysis done by experts for legislative and administrative bodies is highly contentious and difficult. Needless to say, attempting to perform this analysis in personal injury litigation is neither a productive nor a useful exercise.").

244. See John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in a Civil Proceeding is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773 (2006) (discussing the market incentives for expert witnesses to color their testimony in favor of the party that retains them and the difficulty of effectively cross-examining expert witnesses).

245. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (The Ninth Circuit openly discussed these difficulties while considering *Daubert* on remand from the Supreme Court: "[T]herefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to 'scientific knowledge,' constitutes 'good science,' and was 'derived by the scientific method.'"); see also Justin P. Murphy, Note, *Expert Witnesses at Trial: Where Are the Ethics?*, 14 GEO. J. LEGAL ETHICS 217, 226, 236, 239 (2000) (discussing difficulties confronting courts and lawyers in evaluating expert testimony and proposing creation of permanent organization to provide courts with experts to assist them in their gatekeeping function); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L. J. 353, 388 (1988) (questioning the ability of juries to evaluate the utility of product designs).

246. See Murphy, *supra* note 245; Schwartz, *supra* note 245 (questioning the ability of juries to evaluate the utility of product designs).

247. James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1550-52 (1973) (noting that design choices involve polycentric problems which courts are institutionally ill-equipped to evaluate); Kysar, *supra* note 24, at 1740 (discussing research that suggests that the risk-utility calculus implemented by the RAD test of the *Third Restatement* is misconceived); see also *Bernier v. Boston Edison Co.*, 403 N.E.2d 391, 397 (Mass. 1980) (providing an example of a polycentric design issue).

similar to the case under consideration.²⁴⁸ Even if the trier of fact can determine the relative safety and utility of the challenged design as compared to the RAD, how is this balanced against the harm? As the courts have recognized, the value of compensation for harm is left to the discretion and wisdom of jurors and can vary widely from case to case.²⁴⁹ There simply are no tools to measure a pound of pain and no market in which to determine its value.²⁵⁰

In fact, if the finder of fact could reliably, precisely, and accurately evaluate RADs, verdicts in design defect claims would result in injunctive relief in addition to compensatory damages. Once it has been established, from a utilitarian perspective, that the existing product design is inferior to the RAD, what justification is there for allowing the defective design to continue to be produced? If the RAD test is thought to be reliable, the law should compel product modification or enjoin production of the existing design. The failure to do so suggests a lack of confidence in the competence of jurors to correctly select the design that will best enhance safety while retaining the product utility. Jurors are not generally engineers, scientists, or economists and cannot be expected to fully understand the complex factors they must balance in the risk-utility reasonably alternative design analysis. Jurors are, however, ordinary consumers that have an innate understanding of what consumers expect in terms of a fair exchange.²⁵¹

248. Generally, courts only allow evidence of prior accidents where the facts and circumstances of the prior accidents are substantially similar to the plaintiff's accidents. *See generally* OWEN, PRODUCTS LIABILITY, *supra* note 126, § 6.4. This substantial similarity inquiry is often quite narrow. *Id.* However, if the reason the prior accident evidence is introduced is to establish that the RAD results in a safer product, all prior accidents that could have been prevented by the plaintiff's RAD should be admitted even if not similar in other respects to the plaintiff's accident.

249. *See, e.g.,* Richmond Ry. & Elec. Co. v. Garthright, 24 S.E. 267, 269 (Va. 1896) ("No method has yet been devised, nor scales adjusted, by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be; and we cannot say, upon the evidence in this case, that \$1,000 was excessive damages. It was not so great, considering the injuries proved to have been sustained by the plaintiff, as to furnish ground for believing that the jury were actuated by partiality or prejudice; and, unless this is the case, under the well-settled rule in this state, the court should not disturb the verdict.").

250. The problem is particularly complex and indefinite in cases where the victim is killed. Wrongful death claims do not compensate the decedent for his loss of life. Rather, they only permit the decedent's beneficiaries to recover for the loss of services and certain pecuniary losses resulting from the death of the decedent. Some also allow for compensation for the grief of the decedent's beneficiaries. Such monetary compensation, for example, damages awarded for the parents' grief over the loss of an only child, is hardly capable of providing useful numbers for performing the risk-utility analysis contemplated by the algebraic formula. Even if monetary compensation for the grief of the parent was the equivalent of the value of the child to the parent, the deceased child's loss of a full life and all it encompasses—the struggles, achievements, and innumerable pleasures—is all left unaccounted for in the analysis. *See, e.g.,* DAN B. DOBBS, THE LAW OF TORTS § 298 (2000) (discussing the availability of nonpecuniary damages in wrongful death cases).

251. Note, *supra* note 24.

VI. BYSTANDER LIABILITY

Where the RAD test most clearly conflicts with the autonomy paradigm is when the injured party is a bystander rather than a user or consumer of the product. Bystanders injured by product designs stand in a distinctively different position from consumers.²⁵² They have no opportunity to evaluate the product, consider the reputation of the manufacturer, read the warnings, consider the risks, or enjoy the product's benefits.²⁵³ When a bystander is harmed by a danger inherent in the product design, it cannot be fairly said that he or she has consented to the risks an ordinary consumer expects to accompany the product.²⁵⁴ More importantly, a bystander has not received the product's benefits that the users and consumers receive in exchange for the risks they confront in product use.²⁵⁵ As a result, Fletcher's nonreciprocal risk test works well with regard to bystanders because there is no bargained-for relationship between the manufacturer and the bystander injured by an inherent risk of the product.²⁵⁶ Yet the *Third Restatement's* RAD test treats the relationship between the product and plaintiff as irrelevant.

The tenacity with which courts adhered to the privity requirement, even in negligence-based product liability claims, resulted in part from a recognition that those involved in the selection and purchase of products are different from the rest of the world that comes in contact with the product. With the shift from contract to tort liability, it would have made more sense to first apply tort law to those not in privity, rather than those who purchased the product.²⁵⁷ Indeed, several cases²⁵⁸ and scholarly commentators noted

252. Robert F. Cochran, Jr., "Good Whiskey," *Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products for Bystander Injury*, 45 S.C. L. REV. 269, 273 (1994) [hereinafter Cochran, *Good Whiskey*]; Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625, 642 (1971); see also Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders*, 81 KY. L.J. 687, 695 (1993) [hereinafter Cochran, *Dangerous Products*].

253. Cochran, *Dangerous Products*, *supra* note 252, at 688; see also Cochran, *Good Whiskey*, *supra* note 252, at 273; Note, *supra* note 252, at 642.

254. See Cochran, *Dangerous Products*, *supra* note 252, at 693; Cochran, *Good Whiskey*, *supra* note 252, at 283.

255. Cochran, *Dangerous Products*, *supra* note 252, at 704-05.

256. See *id.* at 701-02; Cochran, *Good Whiskey*, *supra* note 252, at 284-85.

257. See Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 553 (2009) (noting that respect for contract principles does not require the application of the economic loss rule bar to third parties not in privity of contract and discussing cases so holding).

258. See, e.g., *Elmore v. Am. Motors Corp.*, 451 P.2d 84, 89 (Cal. 1969). In *Elmore*, the plaintiff was injured when the drive shaft of a 1962 Rambler American station wagon dropped to the pavement causing the vehicle to swerve into the oncoming lane of traffic and collide with the plaintiff's vehicle. *Id.* at 85. The court reversed the trial court's dismissal of the plaintiff's strict liability claim, holding that bystanders may maintain a cause of action on the same terms as users and consumers. *Id.* at 89. The court observed that the policy rationale justifying strict liability applies to bystanders as well as users and

that bystanders injured by a defective product were, from a fairness perspective, more deserving of recovery than were those who purchased or used the product and had an opportunity to inspect for defects and select a product for its benefits, including a competitive price perhaps made possible only because of cost-saving measures that increased product risks.²⁵⁹ Despite the awareness of the important distinction between consumers and bystanders, the fall of privity resulted in a complete disregard of the relationship between the injured party and the product. This failure to distinguish between consumers and bystanders has remained because of the exclusive focus on fault rather than fairness in the determination of liability.

Although the *Restatement (Second) of Torts* took no position as to whether § 402A should apply to claims by persons other than users or consumers,²⁶⁰ almost all jurisdictions that considered the issue did apply it to injured bystanders.²⁶¹ By its own terms, the consumer expectation test is ill-suited to bystander claims. After all, what expectation does the nonconsumer have regarding the product?²⁶² Nevertheless, a separate test for liability to bystanders injured by defective products is unnecessary in the case of manufacturing defects because the consumer never expected that the product would deviate from the manufacturer's design. Whenever a consumer or bystander was injured as a result of a manufacturing defect, liability was imposed. But when the injury is the result of a design defect, it seems ridiculous to analyze the bystander's claims in terms of disappointed consumer expectations.²⁶³ The purchaser implicitly or expressly consents to certain design hazards in exchange for the benefits provided by the product's design in terms of costs or utility. On the other hand, the bystander had no expectations regarding the product he neither purchased nor used.²⁶⁴ Nevertheless, courts

consumers. *Id.* It characterized the restrictions on bystander recovery as an unjustified vestige of the privity requirement and stated that "bystanders should be entitled to *greater protection* than the consumer or user" who may inspect for defect and purchase selectively. *Id.* (emphasis added).

259. Note, *supra* note 252, at 642; see also Bohlen, *supra* note 120, at 354-55; Cochran, *Dangerous Products*, *supra* note 252, at 693; Cochran, *Good Whiskey*, *supra* note 252, at 273.

260. RESTATEMENT (SECOND) OF TORTS § 402A Caveat (1) (1966).

261. Howard Latin & Bobby Kasolas, *Bad Designs, Lethal Profits: The Duty to Protect Other Motorists Against SUV Collision Risks*, 82 B.U. L. REV. 1161, 1174 (2002) (noting the uniform application of § 402A to claims against automobile manufacturers brought by bystanders including motorists in other vehicles and citing cases).

262. See *Ewen v. McLean Trucking Co.*, 706 P.2d 929, 935 (Or. 1985) (interpreting an Oregon statute based upon § 402A's consumer expectation test and holding that a pedestrian struck by a truck was not a consumer whose expectations could be considered in determining if the truck was defective).

263. Davis, *supra* note 153, at 1236-37.

264. *Id.* at 1236.

applied the same consumer expectation test to bystanders' claims of design defect.²⁶⁵

In one respect, the *Restatement (Third) on Torts: Products Liability* improved upon the *Second Restatement* by broadly covering harms to "persons or property"²⁶⁶ rather than the more limited "user[s and] consumer[s]" of § 402A.²⁶⁷ Accordingly, bystanders injured by a defective product are expressly covered by the *Third Restatement*.²⁶⁸ But the shift from the nebulous consumer expectation test to the risk-utility RAD test actually exacerbated the unfairness of applying a single test for liability to consumers and bystanders. The ill-defined consumer expectation test left room for jurors' intuitive notions of fairness to creep in and influence their verdict where the injured party was a stranger to the product. The more precisely defined risk-utility RAD test simply leaves no room for consideration of the plaintiff's relationship to the product. The RAD test, based upon utilitarian principles, logically applies to both consumers and bystanders injured by product designs. The test regards the relationship between product and plaintiff as irrelevant because its goal is to maximize social welfare.

While numerous commentators have noted the unique circumstances of bystanders, Professor Robert Cochran, Jr. has been the sole voice proposing a products liability rule that provides compensation for losses resulting from the nonreciprocal nature of the risks certain products impose on those who neither use nor purchase them.²⁶⁹ He suggests that injured bystanders should not have to prove product defect in order to recover when they have established the following: "1) the product is dangerous; 2) the product is an hedonic product, that is, that it is primarily used for purposes of entertainment and enjoyment; and 3) the plaintiff was a bystander, i.e., one whom the product did not benefit."²⁷⁰ Professor Cochran primarily discusses his novel cause of action as applied to alcohol-related accidents that injure nondrinkers.²⁷¹ Intoxicated drivers impose nonreciprocal risks on other drivers and pedestrians. Cochran makes a compelling argument that the costs of these harms should be

265. Since the consumer expectation test is an objective test, the same test can be applied even if sound reasons justify a more liberal test for liability. *See Note, supra* note 252, at 627-35 (discussing early cases applying the consumer expectation test to bystanders without considering the implications).

266. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

267. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

268. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. d (1998).

269. *See Cochran, Good Whiskey, supra* note 252, at 285.

270. *Id.* at 274.

271. *See id.* at 275-86. Cochran also applied his rule to secondhand tobacco smoke and firearms and suggested it could apply to other products like pleasure boats. Robert F. Cochran, Jr., *From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?*, 27 PEPP. L. REV. 701, 711 (2000).

spread among alcohol consumers rather than the injured bystanders. Cochran also applies his rule to secondhand smoke and firearms.

Although Cochran relies upon Fletcher's paradigm of reciprocity, it is not clear why bystanders injured by hedonistic products are more deserving of compensation than bystanders injured by dangerous products with more functional utility.²⁷² Cochran acknowledges that hedonistic products are important but insists they are not as important as other, more essential products.²⁷³ Fundamentally, this distinction just favors one form of utility over another. The bystander injured by the inherent dangers of forklifts, tractor-trailers, or asbestos seems just as deserving of compensation as bystanders injured by firearms, alcohol, or secondhand smoke. In either case, the bystander is sacrificed as a means to achieve the goals of the product's consumer.

In fact, the greater the product's utility, the greater its capacity to absorb the costs of injuries to bystanders. As the price of the product increases, products with less utility will price themselves out of the market. Wealthy consumers of hedonistic products may continue to purchase them while less affluent consumers will have to forgo the pleasures of these products. In the case of products with more functional utility, they will continue to be consumed to the extent that they can pay their own way. Products with the greatest utility, particularly commercial products, will certainly continue to be consumed because they will enhance the profits of commercial enterprises despite their costs.

However, most of the injuries to bystanders caused by dangerous products like alcohol and firearms are the result of superseding intentional acts of consumers.²⁷⁴ Traditional proximate cause doctrines preclude the imposition of even strict liability for intervening intentional criminal acts. Drunk driving and firearm violence are already prohibited by criminal laws. To impose liability on the manufacturers of these products, in the absence of contributing fault on their part, would require a dramatic shift in proximate cause analysis.²⁷⁵

272. It is not clear how to distinguish hedonistic products from nonhedonistic products. Many products are utilized for both entertainment and enjoyment as well as for less pleasurable purposes. Firearms have tremendous utility for self-defense, but they are also used for pleasure. Many, if not most, consumers utilize their automobiles for both pleasurable and purely functional purposes. Should liability be imposed when a bystander is injured while on a Sunday drive but not when on the way to an early shift at the factory?

273. Cochran, *Good Whiskey*, *supra* note 252, at 279-80.

274. See DOBBS, *supra* note 250, §§ 190, 195.

275. Conversely, many commercial products cause injuries to bystanders even when the consumer is not acting as a superseding intentional tortfeasor. As a result, a traditional proximate cause analysis would not hinder application of strict liability for these claims.

While the autonomy paradigm may not justify Cochran's distinction between hedonistic and nonhedonistic products, his analysis of the distinction between consumers and bystanders is compelling. The question remains: When should bystanders be entitled to compensation even where no RAD is available? The most sweeping possibility is to impose strict liability against manufacturers for injuries to bystanders proximately caused by the inherent risks of their products. At first blush, the suggestion seems to tip the scales too far on the side of individual autonomy at the cost of utility. Yet enterprise liability has long explained that such a rule would not adversely impact the availability of socially useful but dangerous products. Even where liability is imposed, the manufacturer is not prohibited from continued use of the current design. The manufacturer simply compensates injured parties for their loss and can spread those costs among purchasers who benefit from the product's utility. If the product is sufficiently useful, consumers will pay the high price and absorb the costs of the harm to nonusers. Strict liability, imposing compensatory damages rather than punitive damages or injunctive relief, should not restrict the supply of products that have social utility.²⁷⁶

However, the autonomy paradigm does not require strict liability for all injuries to bystanders caused by product designs. Such sweeping application is neither fair nor practical. Certain inherent dangers of commonly used products impose roughly reciprocal risks on all members of society. The dangers from commonly used products may be properly regarded as background risks that must be borne by all as the cost of community living in the same way that the background risks of other common activities must be borne by all members of society.²⁷⁷ When a bystander is injured by risks inherent in the design of a widely consumed product, it is fair to require that the plaintiff establish that the design was not reasonably safe rather than impose strict liability.

For example, all motor vehicles, as designed, create inherent risks as large, heavy, and fast-moving machines. Of course, if the pedestrian is a driver some of the time, he has implicitly consented to the risks associated with typical vehicle uses and imposes similar risks on other pedestrians when driving. The driver also benefits from the utility of motor vehicles as a class. Under such

276. Of course, this also fosters freedom in that it allows producers and consumers to have access to products they desire regardless of the dangers to themselves and others provided they are willing to pay the increased product price as a result of tort claims. The legislature, rather than the court, could step in and prohibit the production of products deemed to cause too much harm to bystanders despite the demand of consumers. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (suggesting the same with regard to "widely used and consumed, but nevertheless dangerous, products").

277. See *supra* text accompanying notes 94-98.

circumstances it does not seem unfair to say that he has consented to the typical background risks of motor vehicle designs. On the other hand, where the plaintiff is injured by a specific motor vehicle design that is not reasonably safe as compared to a RAD, recovery is permitted under the *Third Restatement*.

In some contexts, however, we may be able to determine that the dangers inherent in the design of a particular product create risks to bystanders grossly disproportionate to commonly used products such that strict liability should be imposed for injuries to bystanders. The designs of Sport Utility Vehicles (SUVs), for example, impose risks on pedestrians and occupants of passenger cars vastly exceeding the risks imposed even by cars of similar weight.²⁷⁸ The dangers are most pronounced with the largest, heaviest, and highest-riding SUVs, such as the Ford Excursion, Hummer, and Chevrolet Suburban.²⁷⁹ The height differential between these SUVs and passenger cars results in the frame and protective structures of the SUVs overriding the frame and protective structures on the cars, resulting in massive damage to the passenger compartments.²⁸⁰ Arguably, these vehicles may be defectively designed from a risk-utility, RAD analysis, as most of these SUVs are used exclusively for highway use.²⁸¹ But there may be no RAD that would eliminate the nonreciprocal risks of these vehicles where they are used both for off-road and highway use.²⁸² Yet the benefits enjoyed by these vehicle owners are not shared by the injured bystander who suffers injury proximately caused by the design's risks. The autonomy paradigm would justify the imposition of liability without fault under these circumstances.

There undoubtedly are other consumer products that create clear hazards to bystanders that are greater than the risks of other, more commonly utilized designs. When a bystander is injured as a result of the danger created by these design characteristics, it is appropriate to impose liability on the product manufacturer in order to compensate that victim and ensure that the consumers who benefit from the product's utility pay for the harm that they cause. This could be done on a case-by-case basis, as in the SUV example above. The plaintiff would bear the burden of proving that the product

278. See Kevin Case, *Tanks in the Streets: SUVs, Design Defects, and Ultrahazardous Strict Liability*, 81 CHI.-KENT L. REV. 149, 149-50 (2006); Latin & Kasolas, *supra* note 261, at 1162 (citing a National Highway Traffic and Safety Administration study that found that midsize SUVs were three times as likely to kill other motorists in a collision as passenger cars of approximately the same weight).

279. Latin & Kasolas, *supra* note 261, at 1212.

280. *Id.* at 1201-02.

281. See *id.* at 1216 (suggesting numerous alternative designs that would reduce the risks of override and urging the imposition of liability for injuries to bystanders under traditional defective design analysis).

282. But see *id.* (dismissing this argument primarily because the industry is aware that only a very small percentage of consumers truly drive off-road).

design creates risks greater than the normal background risks of typical product use as well as the plaintiff's own product use.²⁸³ As in all tort claims, the plaintiff would also have to establish that the product design hazard was the cause-in-fact and the proximate cause of his injury. The fact that no RAD is available would not defeat liability. The focus would be on the disproportionate distribution of the risk compared to the benefits, not the unreasonableness of the design.

In order to limit liability to cases of clearly nonreciprocal risk imposition, it may be necessary to require that the plaintiff establish that the dangers to bystanders are vastly greater than background risks of typical product use. A razor's edge analysis, where strict liability is imposed whenever the challenged design is slightly more dangerous to bystanders than the background risks of typical product design, would result in excessive litigation, undesirable transaction costs, and arbitrary outcomes.²⁸⁴ This could be avoided by requiring clear and convincing proof of significantly greater risks than the background risks created by normal product consumption.

In addition to, or as an alternative to, a case-by-case analysis, the autonomy paradigm justifies the imposition of strict liability for injured bystanders for two categories of products. First, strict liability should be imposed upon manufacturers for injuries to bystanders caused by abnormally dangerous products. A second, broader proposal imposes strict liability on manufacturers of commercial products for injuries to bystanders caused by the inherent risks of their products. In both instances, the products create nonreciprocal risks to bystanders without conveying any direct benefits on injured bystanders.

A. Abnormally Dangerous Products

Professor John L. Diamond has suggested that traditional strict liability should be imposed upon manufacturers of abnormally dangerous products for the same reason that strict liability is imposed upon those who conduct abnormally dangerous activities.²⁸⁵ Professor Diamond's proposal, like Fletcher's reciprocity paradigm, focuses on the foreseeable and unilateral nature of the risk rather

283. For example, if both the plaintiff and the defendant drove SUVs, it would not be fair to impose strict liability because the plaintiff also benefitted from the utility of the product design, even if not driving an SUV at the time of the injury.

284. See Keating, *Reasonableness*, *supra* note 22, at 330. Keating uses the term "razor's edge" in a similar way when criticizing Judge Posner's interpretation of the Learned Hand negligence formula. *Id.* In Keating's view, Posner divides liability along a razor's edge, "allowing a penny's difference either way to tip the balance for or against a finding of negligence." *Id.*

285. John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 531 (1983).

than the reasonableness of the risk.²⁸⁶ The manufacture and use of products like dynamite are reasonable from a utilitarian analysis; they simply create an unusually high risk of harm. The manufacturer of products used in abnormally dangerous activities benefits from the unavoidable risks to others created by its products.²⁸⁷ Therefore, it is not unfair to require the manufacturers of the product, as well as the users, to compensate those inevitably injured by the product's inherent risks. The manufacturer is in an ideal position to spread the cost of the injuries to all those who directly benefit from the product's use, and imposing liability would encourage the manufacturer to distribute its product only to responsible users.²⁸⁸ In other words, the question is not whether the product design is defective but, in fairness, whether the manufacturer should pay for the foreseeable harm caused by its product.²⁸⁹

However, Diamond's proposal, like the *Third Restatement*, makes no distinction between consumers and bystanders injured by abnormally dangerous products.²⁹⁰ Therefore, he ignores the users' and consumers' express or implicit consent to product risks in exchange for the benefits of the abnormally dangerous product's utility. The benefits enjoyed by purchasers and consumers of these useful but dangerous products justify requiring them to establish the product design was defective by providing evidence of a RAD before the manufacturer must compensate them for their injuries.

It is necessary here to further define who is a bystander. The rationale for imposing strict liability is the injustice of suffering injury from risks deemed reasonable from a social utility cost-benefits analysis, but from which the plaintiff does not directly receive the benefits of the product's efficiency. Clearly, individual users and consumers implicitly consent to the risks of the products in exchange for the benefits such that liability should only be imposed under existing theories of recovery. The problem of determining who is the user or consumer of the product becomes more complex in the cases of business entities. Should employees of corporate consumers be deemed consumers or bystanders?

For a number of reasons, employees of corporations injured by products selected by their employer should not be treated as bystanders. First, they benefit from the utility of the abnormally dangerous product. They receive a salary and other benefits for their participation in an enterprise which, in turn, directly benefits from

286. *Id.* at 547-49.

287. *Id.* at 548.

288. *Id.*

289. *Id.*

290. Although Professor Diamond seeks to impose strict liability on manufacturers of abnormally dangerous products, he does not limit strict liability to bystanders. *See id.* at 550.

the use of the dangerous product.²⁹¹ They have, at least implicitly, consented to the risk by choosing to work with the dangerous product. Finally, in the event that they are injured, they are partially compensated for their injuries under existing workers' compensation schemes.²⁹² Therefore, unlike the true strangers to the product, they are not left to bear all the cost of the socially beneficial activity.²⁹³

On the other hand, bystanders injured by abnormally dangerous products are exposed to nonreciprocal risks while not receiving any direct benefits in exchange for the product's utility. As the term implies, abnormally dangerous products cannot be considered background risks that are associated with common consumer products. Imposing traditional strict liability upon manufacturers for bystanders injured by abnormally dangerous products like pesticides, explosives, toxic materials, and radioactive material would provide a clear, fair, and efficient exception to the RAD test of the *Third Restatement*.

B. Commercial Products

The autonomy paradigm justifies an even broader categorical distinction for the application of strict liability for injuries to bystanders. Strict liability could be imposed for all injuries to

291. See Keating, *Theory*, *supra* note 12, at 1295. For similar reasons, Keating questions the fairness of providing employees the benefits of strict liability through workers' compensation, while allowing strangers to the enterprise to recover only upon a showing of fault. *Id.* Enterprise liability holds that those who benefit from the enterprise should bear the costs of the harms it creates. *Id.* Employees benefit from the enterprise and voluntarily participate in it; strangers do not. *Id.*

292. These rationales also justify workers' compensation schemes' failure to provide full tort damages including compensation for pain and suffering. The employee has benefited from the activity and has consented, at least on one level, to the risks where the bystander has not.

293. The same rationale supports a distinction between civilians and military service-members in the application of the government contractor defense. The "government contractor defense" bars state law design defect claims by any injured person against government equipment manufacturers, provided that the design conformed to reasonably precise specifications approved by the United States. Unlike military members, civilians are not compensated through any military benefits or veterans' benefits. In addition, civilians do not voluntarily agree to assume the risks of military activities as do the members of our all-volunteer military. The United States does not currently draft military members. Everyone in the military has volunteered to serve and presumably understands the risks associated with military service. In the absence of a civil suit, civilians may be left without any compensation for their injuries. While we all enjoy the benefits of our nation's military superiority, the government contractor defense currently forces the injured civilian to bear a grossly disproportionate share of the costs of equipping the military. Allowing civilian suits might increase the cost of military equipment purchased by the government, but fairness requires that all taxpayers shoulder this burden, rather than the unfortunate injured civilian. See generally John L. Watts, *Differences Without Distinctions: Boyle's Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement*, 60 OKLA. L. REV. 647 (2007).

bystanders proximately caused by the inherent risks of commercial products while bystanders injured by the inherent risks of consumer products would have to recover under the *Third Restatement's* RAD test. There are several rationales behind this distinction between consumer products and commercial products.

First, all persons use consumer products, while commercial products are used typically only by commercial enterprises. Although some consumer products produce greater risks to bystanders than others, all individual consumers subject bystanders to some risks associated with their product consumption.²⁹⁴ As a class, consumer products could fairly be regarded as background risks created by all and borne by all without compensation in the absence of fault as a cost of collective living.²⁹⁵ To the extent that a particular consumer product creates risks substantially greater than the typical risks of nearly universally consumed products, strict liability could be imposed on a case-by-case basis, as with the SUV example above.

Second, the distinction between commercial and consumer products is already recognized in products liability law and has proven to be a workable distinction that the courts can apply. The Magnuson-Moss Warranty Act distinguishes between consumer products and commercial products and defines consumer products as those that are “normally used for personal, family, or household purposes.”²⁹⁶ This definition is nicely suited to identifying background risks because it focuses on the nature of the product’s principle use rather than the specific purchaser’s intended use of the product.²⁹⁷ The use of a typical passenger car by a commercial enterprise creates no risks for bystanders distinguishable from ordinary consumer use. However, regardless of whether a commercial product is used by a

294. For the reasons previously discussed, it would be impractical to fairly compare the risk of the users of one product against the user of the other. While the compact car driver may create less risk to the driver of the SUV in the event of a collision, the compact car driver assumed the risk of driving a small vehicle in exchange for the cost savings both in terms of initial purchase price and fuel savings. Yet the SUV might be less likely to be involved in an accident in the first instance because of its visibility to others and the high vantage point of its operator.

295. See Note, *supra* note 252, at 638-39. In discussing the application of strict liability to bystanders, the author made a similar point in responding to claims that compensating bystanders gives them a free ride at the cost of consumers: “Bystanders as a class purchase most of the same products to which they are exposed as bystanders. Thus as a class they indirectly subsidize the manufacturer’s liability and in this sense do pay for the insurance policy tied to the product.” *Id.*

296. Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1) (2006).

297. Compare U.C.C. § 2-103(1)(c) (2008) (distinguishing between consumer and commercial goods and stating that “[c]onsumer” means an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes”), with 15 U.S.C. § 2301(1) (focusing on the nature of the product’s principle use instead of the purchaser’s intended use of the product at the time of purchase).

business entity or an individual, the risks cannot be regarded as one created by all and fairly borne by all.

Utilitarian rationales supporting the distinction between consumer and commercial products in the Magnuson-Moss Warranty Act also support that distinction when imposing strict liability for injured bystanders. For consumer products, the Act nullifies warranty disclaimers in many instances notwithstanding contrary state law.²⁹⁸ On the other hand, commercial product sellers are allowed to disclaim warranties because the commercial product purchasers are thought to be better equipped to bargain for the allocation of risk. The Act permits commercial entities to waive warranty protection for two reasons. First, commercial product transactions typically involve large expenditures, either because of the quantity or because the product is itself expensive, even in comparison to costly consumer products.²⁹⁹ As a result, the commercial product purchaser may devote substantial resources into evaluation of product risks and utility that consumers typically do not.³⁰⁰ Large purchases also mean that commercial product purchasers are in a better bargaining position with the manufacturer regarding the design of the product and the warranty provided.³⁰¹ Moreover, commercial product consumers can negotiate for contractual contribution and indemnification provisions that are not possible in the typical consumer product transaction.³⁰² Unlike commercial enterprises, consumer product purchasers are typically poorly informed as to the product's design characteristics.³⁰³ The cost of most consumer products does not justify the time and effort required to evaluate the relative risks and utility of specific product designs.³⁰⁴

298. 15 U.S.C. § 2308 (2006). The Uniform Commercial Code also defines consumer goods as goods "used primarily for personal, family, or household purposes." U.C.C. § 2-103(1)(c).

299. Peter M. Kinkaid & William J. Stuntz, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111, 1150 n.162 (1983).

300. *Id.*

301. A similar rationale has been used to bar design defect claims brought against government contractors where the government approved reasonably precise design specifications. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988). The contractor shares the government's immunity from suit under the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2006), because the design was selected, or at least approved, by the government. *See id.* at 211-12.

302. *See* Mark Geistfeld, *Imperfect Information, the Pricing Mechanism, and Products Liability*, 88 COLUM. L. REV. 1057, 1071 (1988); Kinkaid & Stuntz, *supra* note 299.

303. *See Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); OWEN, PRODUCTS LIABILITY, *supra* note 126, § 5.4; Keating, *Theory*, *supra* note 12, at 1286; Kinkaid & Stuntz, *supra* note 299; *see generally* James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 220-24 (2000) (discussing how manufacturer manipulation of consumers through advertising leads to consumers both underestimating and overestimating risk).

304. Kinkaid & Stuntz, *supra* note 299; *see also* Landes & Posner, *supra* note 140, at 536 (consumers do not have perfect information because of the cost of obtaining it).

Therefore, purchasers of consumer products simply do not have the bargaining power that commercial product consumers enjoy.³⁰⁵

Second, corporations and other commercial entities do not face the risk of bodily injury that directly confronts individual consumer product purchasers.³⁰⁶ Employees may bleed, break bones, or develop cancer, but these harms are felt by the corporation only in terms of costs or lost productivity. Commercial entities view the risks of a product in purely economic terms and treat them no differently from other costs of doing business.³⁰⁷ As a result, commercial product users are less likely to either underestimate or overvalue the risks and benefits from an efficiency perspective. In other words, they are better able to determine whether the purchaser or the manufacturer should bear the risk of warranty waiver.³⁰⁸ Conversely, consumer product purchasers are notoriously irrational risk evaluators.³⁰⁹ Unlike commercial entities, consumers are unlikely to regard personal injuries as just another cost. They often overestimate the probability of serious, but unlikely, risks. Other consumers overestimate their ability to avoid product risks; they assume that the injury won't happen to them.³¹⁰ As a result, imposing strict liability as to consumer products may not result in efficiency or safety.³¹¹

Accordingly, the basic rationales supporting enterprise liability also support the imposition of strict liability on the commercial product manufacturer for injuries to bystanders. First, fairness requires that the costs of accidents related to commercial enterprises should be borne by those that profit from the injury-causing activities.³¹² Second, enterprise liability would allow the marketplace

305. See Kinkaid & Stuntz, *supra* note 299, at 1152.

306. See *id.*

307. See *id.*

308. See *id.* at 1150 n.162.

309. See *id.* But see Landes & Posner, *supra* note 140, at 536-37 (performing an economic analysis of products liability but refusing to "assume that consumers have psychological traits that cause them to misperceive risks systematically").

310. See Kinkaid & Stuntz, *supra* note 299, at 1151 n.162; see also Henderson & Rachlinski, *supra* note 303; Kysar, *supra* note 24 (discussing how cognitive errors, irrationality, and perhaps an alternative rationality of consumers impacts their evaluations of product risks and benefits in ways not accounted for by the *Third Restatement's* test).

311. Where a consumer product creates simply too much risk to bystanders, the state legislatures should prohibit the product's distribution rather than merely awarding compensation. Monetary compensation is an imperfect remedy for someone who has suffered a serious loss of autonomy, due to physical injury, where the product does not advance important collective welfare objectives.

312. This is one of the fundamental rationales behind vicarious liability and Workmen's Compensation Acts. Yet, from a pure enterprise liability perspective, respondeat superior liability should not be limited to injuries caused by the "fault" of servants. Moreover, bystanders injured by the enterprise are more deserving of compensation than workers who have voluntarily participated in the enterprise and directly benefited from it. Keating, *Theory*, *supra* note 12, at 1295.

to determine which activities' benefits are sufficient to justify the harms. If the enterprise can pay for the injuries it causes and still remain profitable, it must produce benefits that outweigh its costs (including injuries to bystanders).³¹³ Because both the manufacturers of commercial products and the purchasers of these products are commercial entities, the decisions of both are motivated by financial concerns. Commercial product manufacturers and commercial product consumers will only seek to reduce harms if they must absorb the costs of injuries. Accordingly, they should be required to pay for the harm to innocent bystanders caused by their products.³¹⁴ These costs, when considered by commercial profit-maximizing rational actors, will not result in a loss of utility but will result in a more accurate market determination of efficiency.³¹⁵ If the product's utility does outweigh the risks, manufacturers can compensate bystanders injured by the product's dangers and distribute the costs to those that purchase the products and benefit from the utility of the design features that harmed the plaintiff. On the other hand, the internalization of cost associated with product harms to bystanders will cause commercial product purchasers to demand safer products when the costs do not outweigh the product's utility.

Finally, the distinction between consumer and commercial goods furthers individual liberty to freely engage in consumer product consumption and provides a workable system for the courts and parties to apply. We all engage in the consumption of products that impose risks on bystanders, and we all enjoy the benefits of these products. In theory, individual autonomy could be protected by imposing liability whenever the product that causes harm to the bystander is not a class of products that the bystander also utilizes. Such a rule, however, would result in prohibitive litigation and seems unnecessary provided that the bystander exposes others to roughly similar risks through the products he or she uses.³¹⁶ The distinction between commercial products and consumer products will allow for predictability among manufacturers regarding which products will expose them to strict liability for bystander injuries, without endless, expensive, and in some cases, impossible factual inquiries.

VII. CONCLUSION

Tort law has long struggled with finding the proper balance between protecting individual rights and furthering social utility. The deontological approach of emphasizing the intrinsic worth of a

313. Cochran, *Dangerous Products*, *supra* note 252, at 697-98.

314. *Id.*

315. *Id.*

316. See Fletcher, *Fairness and Utility*, *supra* note 13, at 572 (noting the difficulty in comparing the risks of common yet diverse activities).

particular action is fundamentally incompatible with the consequentialist perspective of judging an action by whether it creates the greatest good for the greatest number of people. Like purebred show dogs, these two approaches function best in artificial, controlled conditions—such as the hypotheticals presented by their proponents. In practice, however, each approach, emphasized to the exclusion of the other, leads to undesirable results. In the real world, the law has long sought to combine their most useful traits and eliminate or counteract their weaknesses.

Numerous scholars have been critical of the *Third Restatement's* abandonment of the consumer expectation test as a retreat from the individual fairness goals of strict product liability.³¹⁷ Yet, to paraphrase Marc Antony from Shakespeare's *Julius Caesar*, I have come to praise the *Third Restatement*, not to bury it.³¹⁸ Careful analysis through the application of the autonomy paradigm and the reasonableness paradigm demonstrates that, in most respects, the *Third Restatement* strikes both a fair and reasonable balance between individual justice and social utility. It is only in its application of the reasonable alternative design test to bystanders that the scales of justice have been unfairly tipped in favor of utility.

Commenting upon the development of the *Third Restatement*, Professor Henderson noted that twenty years from now lawyers will look back and wonder how we could have missed some issue that seems obvious in hindsight.³¹⁹ Viewed through the autonomy paradigm, the *Third Restatement's* failure to provide a distinct category of strict liability for bystanders injured by inherent risks of abnormally dangerous and commercial products is that obvious oversight.

This Article identifies areas where fairness demands that strict liability be imposed. There is room for experimentation among the fifty jurisdictions applying product liability law so that, over time, the laboratories of democracy might settle on the best option.³²⁰ The current reasonable alternative design test, as applied to inherently dangerous but useful product designs, simply exacts too high a price on injured bystanders for the sake of efficiency and utility. Injured

317. See sources cited *supra* note 24.

318. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2. After Caesar's murder at the hand of Brutus, Mark Antony addresses the crowd with the famous line: "Friends, Romans, countrymen, . . . I [have] come to bury Caesar, not . . . praise him." *Id.* Antony then extorts a long list of Caesar's most positive qualities. See *id.*

319. James A. Henderson Jr., *A Discussion and a Defense of the Restatement (Third) of Torts: Products Liability*, 8 KAN. J.L. & PUB. POL'Y 18, 21 (1998).

320. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) (cautioning against the use of the Fourteenth Amendment's Due Process clause as a tool for second guessing legislative efforts at economic regulations). "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.*

bystanders must not be used as a means to achieve a socially beneficial end. Torts suits are private disputes involving real individuals who have suffered real harms. If courts are to remain courts of justice and not simply engines for efficiency, they must weigh the relationship of the injured party to the product when determining liability.